

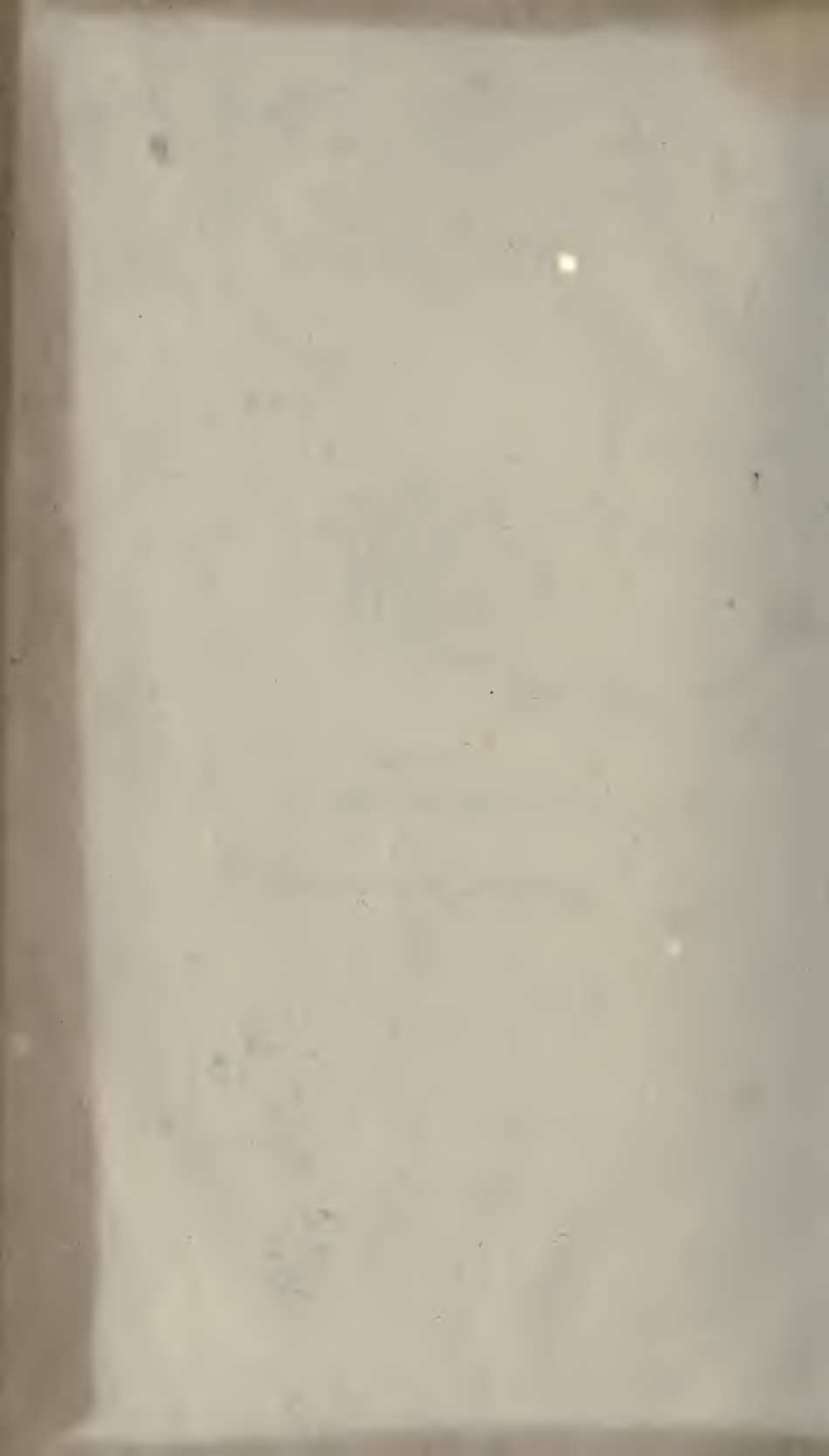


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THE
LAW OF CONTRACTS:

IN
A COURSE OF LECTURES
DELIVERED AT THE LAW INSTITUTION,

BY
JOHN WILLIAM SMITH, ESQ.,
LATE OF THE INNER TEMPLE, BARRISTER-AT-LAW;

AUTHOR OF
"LEADING CASES," "A TREATISE ON MERCANTILE LAW;"
ETC.

WITH NOTES AND APPENDIX,

BY
JELINGER C. SYMONS, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

SECOND AMERICAN EDITION.

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LAW OF CONTRACTS

II

BY WILLIAM S. MITCHELL

OF THE UNIVERSITY OF CALIFORNIA

1911

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1911

P R E F A C E.

THE following Lectures on Contracts were comprised in a Course delivered by the Author to a class of students at the Law Institution, and were designed to explain the elements of the Law of Contracts. They embody the Chief *Principles* of that branch of the law; and it is trusted that they will be found equal to any of the former productions of the Author, for that clear, concise, and comprehensive exposition of his subject, which has characterised his works and ensured the vitality of his reputation. It appears to have been the aim of Mr. Smith to popularise a branch of law which peculiarly affects the ordinary business of life; to divest it of the superfluities with which it is often encumbered; to educe the great maxims by which it is moulded; to free it from the meshes of technicality, and to unravel the perplexity in which an occasional conflict of judgments had from time to time involved it. In so doing, he has used Cases, not as the body of the work after the fashion of modern text-books, but for the subordinate purpose of illustrating the spirit of the law.

The Lectures brought down the modifications introduced by late decisions to the Twelfth Volume of "Adolphus and Ellis's Reports;" and, consequently, left many points unnoticed which have been elucidated or altered by subsequent judgments. The recent growth of Public Companies, and the rapid development of commercial enterprise, have likewise combined to render the Lectures written in 1842 to this extent imperfect now. It fell to the lot of the Editor to supply this deficiency. Notes and an Appendix have been consequently added; it being obviously essential that the text of the Lectures should be given to the Public precisely as they were delivered by their lamented Author.

The Editor does not presume to hope that in these additions he has car-

ried out the scheme of the Author, or approached the inimitable style of the text. He humbly claims credit alone for an earnest endeavour to collect and annex the requisite additions to the Lectures with the utmost expedition, in order to present another work by John William Smith, with the least delay, to the Profession which already ranks him as among the most gifted of its writers, and most learned of modern Lawyers.

J. C. S.

Aberystwith, Nov. 20, 1846.

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USED IN THIS WORK.

A. & E. or Ad. & Ell.	Adolphus & Ellis.
Al.	Alley.
Anst.	Anstruther.
Atk.	Atkins.
B. & A. or B. & Ad.	Barnewell & Adolphus.
B. & A. or B. & Ald.	Barnewell & Alderson.
B. & B.	Broderick & Bingham.
B. & C. or B. & Cr.	Barnewell & Creswell.
Beav.	Beavan.
Bl.	Blackstone.
Bligh, N. S.	Bligh's New Series.
B. N. C. or Bing. N. C.	Bingham's New Cases.
Bos. & Pul.	Bosanquet & Pullen.
Bull. N. P.	Buller's Nisi Prius.
Bulst.	Bulstrode.
Burr.	Burrows.
Camp.	Campbell.
Car. & Kir.	Carrington & Kirwan.
Car. & M.	Carrington & Marshman.
Car. & P.	Carrington & Payne.
Carth.	Carthew.
C. B.	Common Bench Reports.
Chit.	Chitty's Reports.
Cl. & Fin.	Clarke & Finelly.
Co.	Coke's Reports.
Cowp.	Cowper's Reports.
Cro. Eliz.	Croke temp. Elizabethi.
Cro. Jac.	Croke temp. Jacobi.
Cr. & J.	Crompton & Jervis.
Cr. & M. or Cr. & Mee.	Crompton & Meeson.
Cr. M. & R.	Crompton, Meeson & Roscoe.
Doug. or Dougl.	Douglas.
Dowl.	Dowling.
Dowl. N. S.	Dowling's New Series.
Dy.	Dyer.
E. or East	East's Term Reports.
Esp.	Espinasse.
Fost. C. L.	Foster.
Hare	Hare's Reports.
H. Bl.	Henry Blackstone.
Hob.	Hobbe's Reports.
Jur.	Jurist.

L. J. C. C. or L. J. L. C.	Law Journal, Lord Chancellor's Court.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Exc.	Law Journal, Exchequer.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. Q. B.	Law Journal, Queen's Bench.
L. T. or Law T.	Law Times.
Lev.	Levinz.
Lord Raym.	Lord Raymond's Reports.
M. & C. or M. & Cr.	Mylne & Craig.
M. & G. or M. & Gr.	Manning & Granger.
M. & M. or Moo. & Mal.	Moody & Malkin.
M. & R. or Moo. & Rob.	Moody & Robinson.
M. & S.	Maule & Selwyn.
M. & W. or M. & Wels.	Meeson & Welsby.
Mod.	Modern Reports.
N. & M. or Nev. & Man.	Neville & Manning.
N. & P. or Nev. & Per.	Neville & Perry.
N. R. or N. C.	Bingham's New Reports.
Noy.	Noy's Reports.
Pea.	Peake.
Plowd.	Plowden.
Pr.	Price.
P. Wm.	Peere Williams.
Q. B.	Queen's Bench Reports.
Rob. Adm. Rep.	Robinson's Admiralty Reports.
Rol.	Rolle.
R. & M. or Ry. & M.	Ryland & Manning.
Salk.	Salkeld.
Saund. or Wms. Saund.	Williams's Saunders.
Scott, N. R.	Scott's New Reports.
Sider.	Siderfin.
Sim.	Simons.
Skin.	Skinner.
Stark.	Starkie's Reports.
Stark. N. P. C.	Starkie's Nisi Prius Cases.
Str.	Strange.
Taunt.	Taunton.
T. R.	Term Reports.
Tyrw.	Tyrwhitt.
Vern.	Vernon.
Ves.	Vesey.
Ves., sen.	Ves., senior.
Ves., Jun.	Ves. junior.
W. Bl.	William Blackstone.
Wils.	Wilson.
Y. & C. or Y. & Col.	Younge & Collyer.
Y. & J.	Younge & Jervis.

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THE LAW OF CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS, AND ON CONTRACTS BY DEED.

THE whole practice of our English Courts of Common Law, if we except their criminal jurisdiction, with which we have at present no concern, and their administration of the law of real property, of which, as Real Property Law forms the subject-matter of another distinct class of Lectures, it is not my intention to speak,—if, I say, we except these two heads, to which may possibly be added those cases which fall within the fiscal jurisdiction peculiar to the Court of Exchequer, the whole of the remaining subjects with which the jurisdiction of a Court of Common Law is conversant may be distributed into two classes, *Contracts* and *Torts*. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you *will find that it resolves [*2] itself into a *contract* or a *tort*. Thus, suppose it to be the non-performance of a covenant, the non-payment of a bond, the dishonour of a bill of exchange, the non-payment of rent, the default of a surety,—these are all subjects of inquiry arising from contracts. So, again, if it involve an assault on the person, an injury to the reputation by libel or slander, a nuisance to the dwelling or the premises, a conversion of property,—these are only so many descriptions of torts. And as the subjects of legal inquiry divide themselves, so do the forms in which the inquiry is carried on; for all actions, as you are aware, are of TORT or of CONTRACT, a division which, as you see, is rendered necessary by the very nature of things, and does not result from any arbitrary principle of arrangement.

Now, therefore, the whole subject-matter of the inquiries about which our Courts of Law are conversant (excepting the cases I have excepted) being distributable into these two heads, *Contract* and *Tort*, I am about to take the former of them, that of *contract*, and state to you those principles of every-day recurrence which govern the law of England relative to contracts, and which it is absolutely necessary that every lawyer must bear constantly

in mind, and have (to use the ordinary expression) at his fingers' ends, if he will avoid falling into egregious mistakes in the course of his daily practice. This is all that can be done in an elementary lecture *like the [*3] present. Nice distinctions and subtle disquisitions are neither very intelligible when delivered *viva voce*, nor very easily carried away by the recollection.

All Contracts are divided by the Common Law of England into three classes :—

1. Contracts by Matter of Record.
2. Contracts under Seal.
3. Contracts not under Seal, or Simple Contracts.

With regard to contracts by matter of record, they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few words. At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were ordinarily in use. They are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject. Thus the ordinary mode of compelling a witness to attend and prosecute or give evidence in a criminal case is by *recognizance*, in which he binds himself to the Queen in a certain sum conditioned for the performance of the duty imposed on him; and in case of his making default, that sum accordingly becomes forfeited, and payable to Her Majesty.

[*4] The commonest case of a recognizance between *subject and subject was that of bail, which has, however, become much less frequent since the Act restraining the right to arrest on mesne process.

The peculiar incidents of a contract of record are, first, that, like all records, they prove themselves, their bare production without any further proof being sufficient evidence of their existence, should it be controverted.

Secondly, That if it become necessary to enforce them, that may be done, if it be thought proper, by writ of *scire facias*,—a writ which lies on a record only, and consequently cannot be made use of for the purpose of enforcing any other description of contract.

However, as I said, the other two classes of contract are those which are of most practical importance, and to which, therefore, my observations will be addressed. These, as I have said, are—

1. Contracts by Deed.
2. Contracts without Deed, or Simple Contracts.

1. With regard to contracts by deed :

A Deed is a written instrument, sealed and delivered.

Let us pause for a few moments to consider the parts of this definition.

In the first place, it is a written instrument, and this writing, the old books say, must be on paper or parchment, for if it were written on linen, woods, or other substance, it would not be *a deed. But, though every [*5] deed must be written, it is not necessary that every such instrument should be *signed*, for at Common Law signature was not an essential ceremony; and, although now by several statutes, particularly the statute of Frauds, of which I shall have presently a good deal more to say, *signature* has been rendered essential to the validity of certain specified contracts, yet there are

still many which are not affected by any statute, and to such contracts, even if entered into by deed, signature is not an essential. (See Bacon's Abr. Obligation C.)(a)

*Secondly, it must be *sealed and delivered*. This is the main distinction between a *deed* and *any other contract. The seal is [*6-*7] an indispensable part of every deed, and so is the *delivery*; with regard

(a) The question whether it is essential that deeds be signed as well as sealed, has been recently argued in the Court of Queen's Bench, in the case of *Cooch v. Goodman*, 2 Q. B. 580, where Lord Denman, C. J. says, "Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of signing, and super-added it to sealing and delivery in case of a deed." Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, p. 56, b., treats this passage in Blackstone as a mistake, from not attending to the words of the statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it." It thus appears to be still an open question. Seals in England date with the Conquest. The Normans first introduced them, and caused the Saxon writings to be sealed with them. The inability of many of the Norman settlers to write not improbably led to the disuse of signatures and the general substitution of seals. We learn from Dufresne and Selden that seals were granted to the heirs of feudal estates on their majority; and Glanville says, that "If a man acknowledges the seal attached to a deed to be his own seal, he is bound to warrant the terms of the deed, and in all respects to observe the compact expressed in the deed, as contained in it, without question; and it is to impute it to his own indiscretion if he incur loss by negligently preserving his own seal;" and down to the 29 Chas. II. no doubt was entertained of the sufficiency of sealing and delivery without signing; 3 Preston, Abs. 61. The Statute of Frauds, as Blackstone observes, "expressly directs the signing, in all grants of lands, and many other species of deeds, in which (he adds), therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other."

The question arose whether sealing was signing within the statute as early as 33 Chas. II., when the Common Bench incidentally decided that it was: (see *Lemayne v. Stanley*, 3 Lev. 1;) but the decision was there based on the fact that the testator Stanley had written the instrument with his own hand, and that the words, "I, John Stanley, make this my last will and testament," was a sufficient signing within the statute, which does not direct whether it shall be signed at the top, or the bottom, or the margin, but that signing in any part shall be sufficient. The case is cited in that of *Warneford v. Warneford*, Strange, 764, and appears to have been the authority for the judgment given by Raymond, C. J., who ruled that "Sealing a will is a signing within the statute of Frauds and Perjuries." This decision, though cited and overruled by Blackstone, seems to have given rise to the broad doctrine laid down in subsequent text-books, that "the statute of Frauds is applicable only to mere agreements not attended with the solemnities of a deed;" although that statute in express terms requires that all devises, &c., "shall be in writing, and signed by the party so devising the same;" and the 3d section, relating to leases, expressly names deeds—"unless it be by deed or note in writing." Such deeds, therefore clearly require signature, as stated in the text.

Sir Edward Sugden says of Powers, "If the instrument be a will, and the subject of the power be *personal* estate, it may be executed by a mere paper writing, without signature or attestation, in like manner as a will of personalty. So, if the property be *real* estate, the will must be executed *with the solemnities required by the statute of Frauds*, because it is within all the inconvenience of the statute;" 1 Sug. on Pow. 297. He afterwards says that "Signing is not essential to a deed, though sealing is" (p. 304.)

Mr. Preston, in his note to Sheppard's Touchstone, says, "It is apprehended the statute is applicable to mere agreements, not to deeds: this will appear very clear from the words of the statute." This may be so as regards the 1st section, but nevertheless deeds are expressly named in the 3d section, whilst other sections relate to contracts which are ordinarily by deed. There have been decisions that a mark is a signature. (*Harrison v. Harrison*; *Addy v. Grix*, 8 Ves. jun. 185.) but not that sealing includes signing, or that the signing of deeds may be dispensed with under the statute of Frauds, except the case in *Strange*, which, it is submitted, is based entirely on an *obiter dictum* in the case above cited, of *Lemayne v. Stanley*, and from which Levinz, J. dissented.

It is therefore probable that the signature of deeds will be ultimately held requisite, whenever their subject-matter falls within statutes which expressly require it; but that in other cases sealing and delivery are alone essential.

to which you must, however, observe, that it is not absolutely necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended; (see *Goodright v. Strahan*, [8] Cowp. *204, and *Bac. Abr. Obligation D.*): thus it is said by Lord Coke, in the *Commentary on Littleton*, 36 a., that *a deed may be delivered by words without actual touch, or by touch without words*. "The delivery," his Lordship says, "is sufficient without any words, for otherwise, a man who is mute could not deliver a deed." . . . "And, as a deed may be delivered to the party *without words*, so may a deed be delivered by *words without* any act of delivery, as if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee. "Go, and take up the writing; it is sufficient for you, or it will serve the turn, or take it as my deed," or the like words, it is a sufficient delivery." (See further *Doe d. Lloyd v. Bennett*, 8 C. & P. 124.) However, in practice, it is always safest and most advisable to follow the ordinary and regular course, which is, to cause the person who is to deliver the deed to place his finger on the seal, and acknowledge the seal to be his seal, and state that he delivers the instrument as his act and deed. (a)

[9] *It is not necessary that the delivery should be to the person who is to take the benefit of the deed. (See *Doe d. Garnons v. Knight*, 5 B. & C. 671.) The judgment in that case, which was delivered by Sir John Bayley after a *curia advisari vult*, is worthy of a most careful perusal; the learning relating to this subject will be found there ably collected and discussed. The inference of the Court, of which his Lordship was the organ, there drew from all authorities on the subject was,

1st, "That where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed, and that delivery to the party who is to take by it, or any other person for his use, is not essential."

2d, "That delivery to a third person for the use of the party in whose favour a deed is made where the grantor parts with all contract, even
[10] "the deed makes the deed effectual from the instant of such delivery." (See also *Doe d. Lloyd v. Bennett*, 8 C. & P. 124.) (b)

(a) Any print made upon the wax, according to Sheppard's Touchstone, suffices as a seal, and the same piece of wax may serve several parties, so long as each separately impress it for himself, or one for all. (See *Cooch v. Goodman*, supra.) The 8 & 9 Vict. c. 113, facilitates the admission of certain official documents, and dispenses with proof of the seal.

It is essential that the deed be sealed at the time it is executed. It is laid down in *Pigot's case* (11 Co. 27,) that any material alteration, whether by the party executing, or by a stranger, without the privity of the obligee, will invalidate it. A decision to the contrary, in favour of the validity of a bond in blank afterwards filled up, by Lord Mansfield, in *Texira v. Evans*, cit. 1 Anst. 228, has been overruled in *Hibblewhite v. M'Morine*, 6 M. & W. 200; see also *Davidson v. Cooper*, 11 M. & W. 778, where the placing of seals to a guaranty was held to vitiate it, and the principle laid down in *Pigot's case* was confirmed.

(b) The doctrine thus stated in *Doe d. Garnons v. Knight*, had been subsequently more broadly laid down, and without the qualifications by which it was there confined in the judgment of Bayley, J. It has been recently held that where the instrument has been sealed and delivered, its retention by the grantor, though intended by him to render it inoperative, will not affect its validity. See *Fletcher v. Fletcher*, 4 Hare, 67, where V. C.

Before quitting the subject of delivery, it is right to explain the distinction between a deed ordinarily so termed, and an *escrow*. An escrow is a deed delivered conditionally to a third person, to be delivered to the person for whose benefit it purports to be, on some condition or other. If that condition be performed, it becomes an absolute deed; till then it continues what is called an escrow, and if the condition never be performed, it never becomes a deed at all.

This conditional delivery must be to some third person, for if it were to the party himself who is to be benefited, the deed would become absolute, though the party delivering were to say in express terms that he intended it to be *conditional only; for it is impossible by words to get rid of the legal operation of the delivery; and therefore in *Holford v. Parker*, Hob. 246, where the defendant in debt on bond endeavoured to set up a delivery as an escrow to the obligee himself, the Court thought that the plea was so clearly bad, that they would not hear any argument upon the subject. Where, however, the deed is delivered to a third person as an escrow, the delivery is, as I said, conditional, and when the condition has been performed, it becomes absolute and takes effect, not from the date of performing the condition, but from the date of the original delivery; so much so, that it has been held, that where a bond was delivered upon condition, and the obligor and obligee were both dead before the condition was performed, yet on that event happening, it became the deed of the deceased obligor, so as to create a charge upon his assets as against his representatives. (See *Graham v. Graham*, 1 Ves. jun. 274; *Froset v. Walsh*, Bridg. 51.)(a)

* Such, then, being the essentials of a deed, *writing* on paper or parchment, *sealing*, and *delivery*, it is right to add that, for the sake of convenience, deeds are divided into two classes, *Deeds Poll* and *Indentures*; a Deed Poll being (as Littleton informs us, at sect. 370,) “that which is executed by one party only: an Indenture, by several contracting parties.” The names indeed of Deed Poll and Indenture were, as you probably all know, derived from the circumstance that the former was shaved or *polled*, as the old expression was, smooth at the edges, whereas the latter was cut or indented with teeth like a saw, for, in very old times, when deeds were short, it was the custom to write both deeds on the same skin of parchment, and to write a word in large letters between the parts, and then, this word being cut through saw-fashion, each party took away half of it; and, if it became necessary to establish the identity of the instrument at a future time, they could do so by fitting them together, whereupon the word became legible. However, this, though the origin of the word *indenture*, has become a mere form; and though, as you are all aware,

Wigram says, “No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back; but such is unquestionably the law.” See also the judgment of Maule, J., in *Grugeon v. Gerrard*, 4 Y. & Col. 130, and the argument of Mr. Wigram in *Dillon v. Coppin*, 4 Myl. & Cr. 660, where other cases are collected on this point. See also *Hall v. Palmer*, 13 Law Jour., V. C. W. 353.

(a) It is no longer necessary to say that a writing is an escrow at its delivery, in order to render it one, though the law is otherwise stated in *Sheppard's Touchstone*. It is not requisite that this be done by express words, but the facts attending the execution and the result of the transaction may be looked at, and although the delivery were in form absolute, yet if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow; *Bowker v. Burdekin*, 11 M. & W. 146, per Parke, B.

such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might be done in Court during the progress of a trial, if it had been forgotten till then.

[*13] There are one or two peculiarities in the *question of a contract made by deed, which as they apply to all contracts by way of deed, this is the proper place to notice.

In the first place, *a Contract by Deed requires no consideration to support it*; or perhaps it might be more correct to say that the law conclusively presumes that it is made upon a good and sufficient consideration. The importance of this arises from the strong line of *distinction it creates between Contracts by Deed and Simple Contracts*. For a simple contract, that is, a contract by words or by writing not under seal, requires, as I shall hereafter have occasion to explain more at length, a consideration to support it and give it validity. For instance, suppose a written promise in the words;—"I, A. B., promise C. D. that I will pay the debt he owes to E. F." This promise would be absolutely void, unless it could be shown to have been made in consideration of something given to A. B. for making it; for it would be a promise by him to undertake a liability without any consideration or recompense whatever; and, if he neglected to perform it, no action would lie against him, for the maxim *ex nudo pacto non oritur actio* would intervene for his protection. But if to that very instrument, conceived in those very words, the additional solemnity of sealing and delivery were added, so as to make it a deed, it would become a good and binding covenant on which an action

[*14] might be *supported (see *Fallowes v. Taylor*, 7 T. R. 475): and this is on account of the greater formality and solemnity of such an instrument. But, here again, you must observe another well-known and important distinction, namely, that, though it is not necessary to show on what consideration a deed is founded, the party on it is always, on his part, allowed to show that it was founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud; for, were the law otherwise, deeds would, to use the expressions of Lord Ellenborough, be made use of as covers for every description of iniquity. It is therefore a well established proposition that a deed may be invalidated by showing that it is tainted by such circumstances.—(See *Collins v. Blanterne*, 2 Wils. 341.) And it signifies not whether the illegality objected to it be a breach of the rules of Common Law, or consist in the contravention of the provisions of some statute. Thus, in *Collins v. Blantern*, the consideration was the compromise of an indictment for perjury; in *Coppock v. Bower*, 4 Mee. & Welsb., 361, the compromise of an election petition: in *Hindley v. M. of Westmeath*, 6 B. & C. 200, a future separation between husband and wife; and see *Jones v.*

[*15] *Waite*, 5 Bing. N. C. 341.(a) In *these cases the illegality consisted in the infringement of the rule of Common Law, which looks upon such contracts as improper. In other cases, as I said, the contravention of a statute has been held equally fatal; as in *Colborne v. Stockdale*, Str. 493, and *Mazzinghi v. Stephenson*, 1 Camp. 291; of the statutes

(a) Bonds given in consideration of continuing cohabitation are void, but not for past cohabitation, or for the maintenance of the offspring of such intercourse: the rule is that wherever the nature of the contract gives either party a motive to continue the connection it is void, because it is *turpis contractus*, but not otherwise: *Hall v. Palmer*, 3, Hare, 532.

against gaming, in *Levy v. Yates*, 8 Ad. & Ell. 129; of the acts for licensing playhouses, and a great variety of examples might be given; but these are sufficient to establish the principle that, though a man cannot defend himself from liability upon his contract made by deed by saying that there was no consideration for it, he may by saying that there was an illegal one; nay, if there were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract. (See *Waite v. Jones*, 1 Bing. N. C. 662; *Shackell v. Rosier*, 2 Bing. N. C. 646.) Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal; for then the illegal promises alone will be void, and the legal ones valid. (See *Gaskill v. King*, 11 E. 165; *How v. Synge*, 15 E. 440.)(a)

*The next peculiarity of a contract by deed is its operation by way of *estoppel*; the meaning of which is, that the person executing it is not permitted to contravene or disprove what he has there asserted, though he may where the assertion is in a contract not under seal. A good example of this is the case of a receipt. A creditor who has given a receipt not under seal is nevertheless permitted to prove that he has not received the money; *Graves v. Key*, 3 B. & Ad. 313; *Stratton v. Rastall*, 2 T. R. 366; (b) but *it is otherwise if the receipt be by deed, for then the law admits no evidence to the contrary, (see the judgment of the Court [*16] in *Fetch v. Sutton*, 5 East, 230.) Such is the nature of what we call an *estoppel* created by deed, the principle of which is explained by Mr. J. Taunton in *Bowman v. Taylor*, 2 Ad. & Ell. 278. "The principle," said his Lordship, "is not so unjust or absurd as it has been too much the custom to represent. The principle is that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."(c)

(a) "Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest;" 1 Saund. 66, N. 4. Some contracts, bad in part, are rendered wholly void by statute; in all other cases the practical distinction seems to be whether the good covenants or conditions are severable from the bad ones, and whether the illegality of the one affects the other. See *Chesman v. Nainby*, 2 Lord Raym. 1456; *Mallam v. May*, 11 M. & W. 653. A covenant, for instance, not to carry on business as a perfumer "within the cities of London and Westminster, or within the distance of six hundred miles from the same respectively," was held divisible, and that the plaintiff could recover on that part of the covenant which related to London and Westminster, though the latter was void as an illegal restraint of trade; *Green v. Price*, 13 M. & W. 695.

(b) Partners also are not concluded by the receipts of a co-partner if fraudulently given. (See *Farrar v. Hutchinson*, 9 Ad. & Ell. 641.) And where a release is valid in law and invalid in equity, and is a fraud on third persons, the courts of law will set it aside; but in order to call upon the Court to exercise this equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to the fraud; unless that be clearly made out the Courts will not interfere, and the release is conclusive. *Phillips v. Claggett*, 11 M. & W. 84.

(c) Recent examples of *estoppel* by deed and record occur in *Doc dem. Levy v. Horne*, 3 Q. B. 760; *Darlington v. Pritchard*, 4 M. & Gr. 783; *Carter v. James*, 13 M. & W. 137; *Beckett v. Bradley*, 8 Scott, N. R. 843. It may also arise on Bills of Exchange. *Sanderson v. Colman*, 4 M. & Gr. 209; *Armani v. Castrique*, 13 M. & W. 443. An *estoppel* may arise in matter of recital, but not in a collateral action between other parties than those to the instrument which contains the admission. In the case of *Carpenter v. Buller*, 8 M. & W. 200, it was held, that, "if a distinct statement of a peculiar fact is

[*18-*19] *The next peculiarity in a contract by deed is its effect in creating a *merger*. This happens *when an engagement has been made by way of simple contract, that is, by words in writing not under seal, and afterwards the very same engagement is entered into between the same parties by a deed. When this happens the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished. Suppose, for instance, I give my creditor a promissory note for 50*l.*, and then a bond for the same demand, the note is lost, swallowed up in the bond, and becomes totally extinct and useless.

[*20] (See Bayley on Bills, 5th *edition, 334, 335.) Another peculiar incident to a contract by deed is that its obligation cannot be got rid of by any matter of inferior degree: thus a verbal license will not exempt a man from liability for breach of his covenant. The last case on this subject is *West v. Blakeway*, 2 M. & Gr. 729.: there a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do; that permission not being shewn to have been under seal. "It is a

made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in *Coke Littleton*, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of *Lainson v. Tremere*, 1 A. & Ell. 792. * * *. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. *Still less would matter alleged in the instrument wholly immaterial to the contract therein contained*; as for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignees of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them."

In order to take advantage of an estoppel by deed or record, it must be pleaded, where there is an opportunity of doing so, otherwise the estoppel is waived.—2 Smith's L. C. 444, 457; *Doe v. Huddart*, 2 Cr. M. & R. 316. But an estoppel may arise from some act of the party estopped, as well as from matter of record; this is called an estoppel in pais, as where one man has accepted rent from another, in which case he is estopped from afterwards denying that such person was then his tenant. *Stephen on Pl.* 222. And a landlord is similarly estopped from treating as a tenant him whom he has required to enter into that relation with another instead of himself. *Downs v. Cooper*, 2 Q. B. 256, per Lord Denman, C. J. It appears by a subsequent decision that the acts in pais relating to demises must be some "acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate and the like." *Lyon v. Read*, 13 M. & W. 285, in which case, the doctrine held by Bayley, J., in *Thomas v. Cooke*, 2 B. & Ald. 119, is questioned by the Court of Exchequer, and elaborately reviewed. See also *Doe d. Levy*, supra, as to the knowledge of the parties. See also 3 Sug. Vend. & Purch. 428, 10th edit. Estoppels in pais may, but need not be pleaded. See *Pickard v. Sears*, 6 Ad. & Ell. 474, where the Court laid down this rule:—"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position; the former is concluded from averring against the latter a different state of things as existing at the same time." See also *Sanderson v. Colman*, 4 M. & Gr. 220, per Tindal, C. J.; *Sheffield and Manchester Railway Company v. Woodcock*, 7 M. & W. 574, 583; *Gregg v. Wells*, 10 Ad. & Ell. 90; *Sandys v. Hodgson*, 10 Ad. & Ell. 472. Examples of estoppels in pais also occur in *Reg. v. Leominster*, 5 Q. B. 640; *Reg. v. Westmoreland*, 12 Law Journ. M. C. 113.

"well-known rule of law," said the Lord Chief Justice, "that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*. This is so well established," continued his lordship, "that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne*, 2 Wils. 376, which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held upon demurrer that the covenant could not be discharged without deed, and *Blake's case*, 6 Coke, 43 b, was cited." See also *Harris v. Goodwyn*, 2 M. & Gr. 459.

Again, a deed has this further advantage of a simple contract, that in case of the death of the party bound by it, it charges his heirs, (if the deceased bound his heirs by using words for that purpose in the deed) to the extent of any assets that may have descended to him.

You will find the nature of the heir's liability *fully explained in the notes to *Jefferson v. Morton*, 2 Wms. Saund. 6, n. 4.(a) If, [*21] indeed, the debtor had devised the land away, instead of allowing it to descend to his heir, the creditor could at common law have sued the devisee. However, by stat. 3 W. 3, c. 14, usually called the Statute of Fraudulent Dévises, the devisee was made liable as well as the heir, and the enactments of this statute have been repeated, with several improvements, in stat. 1 W. 4, c. 47, usually called *Sir Edward Sugden's Act*: and on the construction of which you may see *Farley v. Biant*, 3 Ad. & Ell. 839.

While on this subject, it may as well be mentioned that, although the right of bringing an action against the heir or devisee is limited to specialty creditors, yet by a statute of 3 & 4 W. 4, c. 104, the simple contract creditors have a remedy against the real estate of the deceased in equity, where, however, their claims are, by the express enactment of the statute, postponed to those of creditors by deeds in which the heirs of the deceased are mentioned.

In the administration of the personal effects also the specialty creditors have, as you are probably aware, a priority over those by simple contract.

Lastly, with regard to the remedy upon a contract by deed; wherever a promise is made by *deed, the performance may be enforced by an action of covenant; and, if a liquidated debt be secured by it, by an [*22] action of debt.(b) These remedies must be pursued within twenty years, except in cases of disability by reason of infancy, coverture, lunacy, or absence beyond seas, such being the period fixed by 3 & 4 W. 4, c. 42, s. 3, which, being later in date though passed in the same session with 3 & 4

(a) 2 Wm. Saund. p. 8 a. et seq. 6th edit.

(b) Debt thus lies for rent on any lease or demise by deed for life or lives, as well as upon leases for years; (8 Ann. c. 14, s. 4;) but not for arrears of an annuity or rent charge for life charged on lands of a freehold nature, so long as the estate of freehold continues, for the law will not suffer a real injury to be remedied by a personal action. *Webb v. Jiggs*, 4 M. & S. 113. Collateral covenants to pay such annuities fall within the same rule: there must be a direct duty on the part of the defendant to pay the plaintiff a liquidated sum to enable him to sue in debt. *Randall v. Rigby*, 4 M. & W. 130; 1 Wms. Saund. 282 y. Neither will it lie against a lessee after the assignment of a lease and acceptance of rent from the assignee, the privity of contract being destroyed by the assent to the assignment, otherwise it would lie even against an executor of a lessee, though he had assigned. See the notes to *Thursby v. Plant*, 1 Wms. Saund. 237. Debt lies also on bonds, whether to pay money or perform awards, on covenants in an indenture, on policies of insurance, charter parties, and mortgage deeds. See 3 & 4 W. 4, c. 42; 2 Wms. Saund. 62 b. n. f, g., & 402 a., and generally on recognizances, *Gilb. Debt*, 395.

W. 4, c. 27, is held to have superseded some inconsistent provisions contained in that statute. See *Strachan v. Thomas*, 12 Ad. & Ell. 535; *Paget v. Foley*, 2 Bingh. N. C. 679.

[*23] *Having thus touched on the general division of Contracts into those of Record, by Deed, and by Simple Contract, and explained the nature of a deed, and the formalities attending its execution,—having pointed out the distinction between the absolute delivery of a deed and the conditional one of an escrow, the distinction between a deed poll and indenture, the peculiar privileges of a contract by deed, whether in respect of the consideration, the estoppel it creates, the means by which its obligation is determined, or the rights which it confers upon a creditor against his debtor's assets,—having pointed out the remedy by which its non-performance is complained of in a court of law, and the time of limitation within which that remedy is to be pursued, it remains to point out in a similar manner the peculiarities attending Simple Contracts. This will be done in the next lecture.

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*LECTURE II.

THE NATURE OF SIMPLE CONTRACTS;—OF WRITTEN CONTRACTS;—THE STATUTE OF FRAUDS.

In the last lecture, I compressed the observations I had to make on the general nature of Contracts under Seal. I now arrive at the class denominated *Simple Contracts*, which comprises all of a degree inferior to deeds, whether they be verbal or written. For though, as I shall presently explain to you, there is in practice, a very wide distinction between *written* and *verbal* contracts, yet, in *theory*, the law of England acknowledges no difference between them at all, but denominates them all by the same term, *Simple Contracts*. And, indeed, they are so far alike that they all, whether verbal or written, are subject to those marks of inferiority to contracts by deed which you heard described in the last lecture.

Thus, they do not create an estoppel: they are capable of being put an end to without the solemnity of a deed. They form no ground of action against an heir or devisee, even though he be expressly named in them, and they require a consideration to support and give them validity, though as I shall have occasion to explain *in a future lecture, there is one case, even among Simple Contracts, in which the consideration need not be shewn, but is presumed to exist unless its existence can be disproved. In these respects, all simple contracts are like one another. But there are two great *practical* differences between written and verbal contracts, which it is necessary to explain at some length to you.

The first concerns *the mode in which they are to be proved*. And it results from an inflexible rule of the law of evidence, that when a contract is reduced into writing it shall be proved by the writing, and by that only; and that no *contemporaneous* verbal expressions shall be engrafted upon it for the purpose of altering, adding to, or taking away from its import. You

will find this principle laid down and enlarged upon in all the treatises on Evidence ; (see, for instance, Phillipps, part ii. cap. 5.) where you will find the application of this rule very largely discussed. Indeed, there is hardly any one branch of the law which has given rise to so much subtle and anxious discussion and inquiry as this single rule of the law of Evidence. The present Vice Chancellor, Sir James Wigram, has, in one of the ablest treatises existing in our law libraries, discussed its application to the single head of Devises.

In applying this rule, therefore, you must take care not to be misled as to its meaning, for, as I *have just said, its consideration involves [*26] very subtle and nice distinctions. It would be impossible to do [*26] complete justice to these in the course of a lecture : still, however, I think that I can point out their nature, so far as to give you a notion of the sort of questions which are likely to arise, sufficient to prevent you from being taken by surprise by such questions, should they occur to you in practice.

Now, the rule itself, as I have said, is, that no *parol*, that is *verbal*, evidence of what took place at the time of making a written contract(a) is admissible for the purpose of contradicting or altering it ; for instance, if *A.* contract in writing with *B.* to deliver him 100 quarters of wheat within three months, at so much per quarter, no evidence would be admissible to show that the wheat was agreed, at the time, to be delivered only in case of the arrival of a ship which the vendor expected from Odessa with wheat *on board ; for that would be, by verbal evidence, to turn an absolute [*27] written contract into a conditional one. So, if a promissory note [*27] (which, not being under seal, is you must be aware, a simple contract) were made payable on one day, verbal evidence could not be admitted to show, that it was meant to be payable upon another. See *Free v. Hawkins*, 8 Taunt. 92 ; and see examples of the application of this principle in *Hoare v. Graham*, 3 Camp. 57 ; *Hogg v. Smith*, 1 Taunt. 347.

But, though you are not allowed to show that the meaning of a written contract was varied by the words, *at the time of making it*, there are some cases in which you *may* shew that it was *subsequently so varied*. There are cases in which the contract is of a description which is not required by law to be reduced into writing at all ; thus if, in consideration of 50*l.*, I promise to go to York on the 1st day of January, and that contract be reduced to writing, verbal evidence would not be admissible, to show that it was agreed *at the same time*, that the contractee was to be at liberty, on payment of 10*l.*, to substitute Edinburgh for York, but verbal evidence *would* be admissible to show that it was next day agreed that, on payment of 10*l.* he might, if he pleased, substitute Edinburgh for York ; for, as there is no rule of law which requires such a contract to be reduced to writing, we might have made it by mere words, and are therefore allowed to give verbal evi-

(a) These rules of course apply exclusively to written and not parol contracts. An illustration of this occurred in the case of an auctioneer who, at the time of a sale, verbally declared a variation from the printed catalogue ; namely, that goods stated therein to be silver were only plated, and so sold them ; the actual contract being a parol one, evidence of the parol statement was held admissible to explain it (*Eden v. Blake*, 13 M. & W. 614 ;) but if the auctioneer had signed an agreement which referred to or formed part of the unaltered catalogue, then his parol declaration of the alteration could not be given in evidence, as it would vary a written contract. *Shelton v. Livius*, 2 Cr. & J. 411.

[*28] dence—not that the written *contract did not contain the intention of the parties at the time of drawing it up—but that they *subsequently* altered a part of it by words, and so in fact, made a *new agreement*. But, though this may be done where the contract is one which the law does not require to be in writing, yet, where a writing is necessary, it cannot be allowed; for, if it were, the effect of the verbal evidence would be to turn a contract which the law requires to be in writing into one partly in writing and partly in words; and therefore, in *Goss v. Lord Nugent*, 5 B. & Ad. 56, it was decided that a contract for the purchase of land (which, by the Statute of Frauds, is required to be written) cannot be altered by a subsequent verbal arrangement.^(a)

Another celebrated distinction on this subject is, that in a written contract or, indeed, in any other written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, although a *latent ambiguity* is so. The meaning of the expressions *patent* and *latent* with reference to this subject is as follows:—

A *patent ambiguity* is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible, as if in a will there were a blank left for the devisee's name.

[*29] *A *latent ambiguity* is where the instrument itself is on the face of it intelligible enough, but a difficulty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith*, without further description. In that case the devise would be intelligible enough on the face of it, and if there were only one John Smith in being, no difficulty could arise. But as there are several thousands, it would be impossible to tell which of them was meant without admitting verbal evidence, which would accordingly be admitted. This would be what is called a latent ambiguity because it would not appear on the face of the instrument, but would lie hid till evidence had been produced showing that there was a great number of persons corresponding in name with the devisee.

There is one exception indeed engrafted on the rule which forbids the reception of evidence for the purpose of qualifying the sense of a written contract; it occurs where parties have contracted with reference to some known and established usage. In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms: for examples of this you may refer to *Wigglesworth v. Dallison*, Doug. 201; *Udhe v. Walters*, 3 Camp. 16; *Powell v. Horton*, 2 Bingh.

[*30] N. C. 668; and the judgment of Baron Parke in **Hutton v. Warren*, 1 Mee. & Welsb. 474.^(b) Yet, even in these cases, the

(a) Both acts and words are inadmissible to vary a written contract, though the parties have acted on the verbal alteration for some years. *Giraud v. Richmond*, 15 Law Jour. C. P. 180.

(b) The usage is in fact the key to the contract, without reference to which the intent of the parties could not be ascertained. This principle has perhaps been carried to its fullest limit in the case of *The Queen v. Stoke-upon-Trent*, 5 Q. B. 303, where the terms of contract of hiring were as follows: "Plate and dish-workers. This day agreed with Ralph Bourne to serve Messrs.—, from &c. to &c., at prices good out of oven, as per opposite side. We agree to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants. Witness," &c. Evidence was held admissible to show that holidays were so customary that the contract must be supposed to have reference to them; although the terms of hiring were quite general, and the stipulation to lose no time certainly does not favour the supposition. A safer rule perhaps is that laid down in *Lewis*

Courts never admit of an *usage* inconsistent with the written contract ; for “usage” (says Lord Lyndhurst in *Blackett v. R. E. Insurance Co.*, 2 Tyrwh. 266,) may be admissible “to *explain* what is doubtful* but “is never admissible to contradict what is plain.”—(See also [*31] *Yeates v. Pym*, 6 Taunt. 445, and *Roberts v. Barker*, 1 C. & Mee. 808.) (a)

The other point to which I alluded as constituting an important practical distinction between Simple Contracts by mere words and by writing is, that there are several matters, which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*. So that a simple contract about those matters would be available if written ; unavailable, if oral.

By far the most important class of contracts subject to this observation are those falling within the enactments of the *Statute of Frauds*. And these are of such constant recurrence in practice, that it will be right to devote some time to their consideration.

The Statute of Frauds, as it is called, was passed in the twenty-ninth year of the reign of Charles II., and is the 3rd cap. of the statute book of that year. It is said to have been the joint production of Sir Matthew Hale, Lord Keeper Guilford, and Sir Leoline Jenkins, an [*32] eminent civilian. The great Lord Nottingham used to say of it “*that every line was worth a subsidy*,” and it might now be said with truth, that every line has *cost* a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation; Every line, and almost every word of it has been the subject of anxious discussion, resulting from the circumstances that the matters which its provisions regulate are those which are of every-day occurrence in the course of our transactions with one another.

The chief object of passing the statute was to prevent the facility to frauds and the temptation to perjury held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. How great this temptation and facility were is obvious ; and accordingly, the statute, in the first section, declares its own enactment to be “for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury ;” and then, it goes on to provide for various cases in which it was apprehended that such prac-

v. Marshall, 8 Scott, N. R. 846, that to vary the ordinary meaning of plain words, the evidence of usage must be clear and irresistible. But parol evidence of usage may always be given to assist the interpretation of terms peculiar to a trade, and the sense they attach to them, *Spicer v. Cooper*, 1 Q. B. 424, or the meaning of cant phrases, *Evans v. Pratt*, 3 M. & Gr. 759. Extrinsic evidence may on the same principle be given to explain contracts otherwise unintelligible, by showing the situation of parties at the time it was made, provided the terms of the contract be not varied, (*Sweet v. Lee*, 3 M. & Gr. 466, per Tindal, C. J.) or even to show former transactions between the same parties, which may throw light on the terms of the contract. 11 Clarke & Fin. 45. See also *Trueman v. Loder*, 11 Ad. & Ell. 596, per Lord Denman, C. J.

(a) In the words of Mr. Baron Alderson, in the subsequent case of *Clarke v. Roystone*, 13 M. & W. 757, “Where a stipulation is inconsistent with the custom of the country, the contract must prevail and the custom of the country must be excluded.” In these cases it appears to be simply a question whether the words of the contract themselves sufficiently disclose the import of the contract ; if so, no custom can vary it, and no evidence of custom is admissible. See *Ford v. Yates*, 2 M. & Gr. 549 ; *Charlton v. Gibson*, 1 Car. & Kir. 511, per Cresswell, J. ; *Hewson v. Cooper*, 3 Scott, N. R. 48 ; *Clifford v. Turrell*, 6 Jurist, 5, & 921, V. C. Bruce.

tices were likely to occur; thus the *first* of the twenty-five sections of which it consists is levelled at parol conveyances of land, and contains the celebrated enactment, of which you have doubtless often heard, that they [*33] *shall create estates at will only except in the case of leases not exceeding three years, and reserving two-thirds of the annual value as rent, which are excepted by the second section.

The *third* section is levelled at parol assignments, grants or surrenders; the *fifth*, at unattested devises; the *sixth*, at secret revocations or devises; the *seventh*, at parol declarations of trust; the *nineteenth* and *twentieth* against *nuncupative* wills of personalty; and the *twenty-first* against verbal alterations in written wills.

But the two sections which mainly affect *contracts*, and which, consequently, are chiefly important to the subject of this lecture, are the *fourth* and the *seventeenth*.

The 4th section enacts—"That *no action* shall be brought to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement, made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The contracts provided for by this section are, therefore, as you will have observed—

1st. *Promises* by an *executor* or *administrator* to answer damages out of his own estate.

[*34] *2d. *Promises* to answer for the *debt, default or miscarriage of another person*

3d. *Agreements* made in consideration of *marriage*.

4th. *Contracts of sales of lands, tenements, or hereditaments, or any interest in or concerning them.*

5th. *Agreements not to be performed within the space of a year after the making thereof.*

The latter part of the section applies equally to each of these five sorts of contract, which are equally prohibited from being made the subject-matter of action, unless the *agreement*, or some note or *memorandum* of it shall be in writing signed by the party to be charged, or some person thereunto by him lawfully authorized,

Now it has been decided,—and the decision you will observe is equally applicable to each of the five descriptions of contract, that, in consequence of the introduction of the word "*agreement*," the *consideration*(a) as well as the *promise* must appear in writing. That was settled by the well-known cases of *Wain v. Walters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & A. 595; and *Jenkins v. Reynolds*, 3 B. & B. 14. For, the word *agreement* comprehending what is to be done on both sides, comprehends of course the *consideration* for the promise as well as the *promise* itself. The judgment

(a) See further of "Consideration," Lect. IV. post.

of Lord Ellenborough *in *Wain v. Walters* very clearly explains the reason upon which this doctrine is founded. [*35]

"The clause in question in the Statute of Frauds," says his lordship, "has the word *Agreement* ('*unless the agreement upon which the action is brought, or some memorandum or note thereof shall be in writing*,' &c.;) and the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper or correct sense, as signifying a mutual contract, on consideration, between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another, is to be charged, in the form of the proceeding against him, *upon his special promise*; but without a legal *consideration* to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word *promise* being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood the *agreement* in respect of which the promise was made, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; (a) for, otherwise, the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards *be able to prove, [*36] the omission of which would materially vary the promise, by turning that into an absolute promise, which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain.

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that the *Agreement*, the meaning of which word I have just explained, need not be contained in a single writing but may be collected from several. You will find that established by *Jackson v. Lowe*, 1 Bing. 9; *Phillimore v. Barry*, 1 Camp. 513; *Dobell and Hutchison*, 3 Ad. & Ell. 355, and other cases. But, though, where there are several papers the agreement may be collected from them all, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together can make out the connection and the meaning of the whole, without the aid of any verbal evidence; (b) yet it is otherwise

(a) The consideration must thus not only appear, but it must be sufficient; see *French v. French*, 2 M. & Gr. 644, where all the cases are noted, p. 649, n. (b).

(b) It must at least appear by necessary implication. See also *Morley v. Boothby*, 3 Bing. 107; *Bentham v. Cooper*, 5 M. & W. 621; *Sykes v. Dixon*, 9 Ad. & Ell. 693; *Kennaway v. Treleavan*, 5 M. & W. 498.

Bought and sold notes will satisfy the statute if they agree, even though they may differ from the entry of the sale to which they relate in a broker's book; but when they differ in any material respect, there is no contract. *Gregson v. Ruck*, 4 Q. B. 737; *Thornton v. Meux*, 1 Mal. & M. 43. Some conflict of judicial opinion exists, whether, when the bought and sold notes disagree in a material point, an entry in the broker's book, signed by him, is sufficient evidence of the contract to satisfy the statute: *Abbott, C. J.* and *Ld. Ellenborough, C. J.* have both held that it is, on the ground that the "broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of the buyer and seller." *Grant v. Fletcher*, 5 B. & Cr. 436; *Heyman v. Neale*, 2 Camp. 337; *Groom v. Aflalo*, 6 B. & Cr. 117. The reverse was held in *Hawes v. Forrester*, 1 M. & Rob. 368. *Lord Abinger, C. B.*, however, held, that whenever the bought and sold notes materially differed, the entry in the broker's book would not satisfy the statute, "unless it can be shewn that the broker's book was known to the parties." See *Thornton v. Charles*, 9 M. & W. 802, which appears to be the law on this point.

[*37] when *such connection does not appear on the face of the writings themselves, for to let in verbal evidence in order to connect them, would be to let in the very mischief which it was the object of the framers of the Act to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses: and, therefore, where a written agreement is required by the fourth section of the statute, it is clear that several writings, not bearing an obvious connection *inter se* in sense, cannot be joined together by verbal evidence to make up the agreement. This was one of the points decided in the great case of *Boydell v. Drummond*, 11 East, 142, where the plaintiff proposed to publish an edition *of Shakspeare with splendid [*38] engravings, and issued a prospectus stating the terms. A copy of the prospectus lay in his shop, and beside it, lay a book headed "*Shakspeare Subscribers; their Signatures*:" but there was nothing in the book about the prospectus or in the prospectus about the book. The defendant had signed the book, and, having afterwards refused to continue taking in the Shakspeare, the plaintiff brought an action against him. Now the Shakspeare was not to be finished for some years, and, therefore the case was one of those provided for by the fourth section of the Statute of Frauds, falling within the words "any agreement that is not to be performed within "one year from the making thereof." It was therefore necessary that it should be in writing, and that that writing should be "*signed* by the party "to be charged, or his agent." Now, the terms of the agreement were in the *prospectus*, and, so far the statute had been complied with, but the *signature* unluckily was in the book, and the Court held that, as the prospectus did not refer to the book, or the book to it, the statute had not been complied with, and the contract could not be enforced.

"If," said J. Leblanc, "there had been any thing in that book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might perhaps have done: but, as the signature now stands, without reference of any sort to the prospectus, there was nothing [*39] *to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the statute of Frauds."

There is a third point common to all the five contracts mentioned in the fourth section; it is with regard to the signature. The words are, you will recollect, "*Signed by the party to be charged* therewith, or some other "person thereunto by him lawfully authorized." The signature to be that of the party *to be charged*; and therefore, though as I have pointed out to you, both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge*; that was the point decided in *Laythroap v. Bryant*, 2 Bing. N. C. 744.(a)

(a) And if a contract already exists, binding one party, any subsequent note signed by the other party, which includes or refers to the terms of the same contract, is equally binding. *Dobell v. Hutchinson*, 3 Ad. & Ell. 355.

It matters not whether the signature be placed at the top or elsewhere in the document so that the intention to sign it be clear. *Johnson v. Dodgson*, 2 M. & W. 653; but it is essential that it should have been signed before an action is commenced to enforce it, or

*The last point I shall mention common to all the contracts falling within *this* section regards the consequence of non-compliance with [*40] its provisions. (a) This consequence is, not that the unwritten contract shall be void, but that *no action shall be* brought to charge the contracting party by reason of it. (b) And cases may occur, in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus, for instance, if money have been paid in pursuance of it, that payment is a good one for all purposes: for instance, in *Griffith v. Young*, where 100*l.* was paid by the incoming tenant to the outgoing one, partly for himself, and partly for the landlady, in pursuance of a verbal agreement. The incoming tenant refused to pay the landlady her share, saying that there was no writing, and that words *were* but wind. The landlady brought her action, and Lord Ellenborough nonsuited her, on the ground that the agree- [*41] ment, being for an interest in land, ought to have been in writing; but the Court of Queen's Bench set aside the nonsuit, with Lord Ellenborough's own concurrence.

I have now pointed out to you the matters in which all simple contracts agree, and the practical differences which exist between the effect of *written* and that of *verbal contracts*, although in theory both sorts fall within the denomination *Simple Contracts*. I have described the consequences which follow from the rules of evidence upon the reduction of any contract whatever into writing, and I have begun to describe those consequences which follow from the provisions of the Statute of Frauds, in the cases to which it is applicable. But as it is impossible to finish the consideration of that statute this evening, I shall proceed with it in the next lecture.

*LECTURE III.

[*42]

THE STATUTE OF FRAUDS.—PROMISES BY EXECUTORS AND ADMINISTRATORS.—GUARANTEES.—MARRIAGE CONTRACTS.—CONTRACTS FOR THE SALE OF LANDS.—AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

In the last lecture I began the consideration of those species of contracts which according to the fourth section of the Statute of Frauds, must be evidenced by writing.

I touched on the points which equally apply to each of those five species, those namely which regard the appearance in the writing of the considera-

there would be no good contract, and therefore no cause of action at the time it was brought. (See *Bill v. Baiment*, 9 M. & W. 36; which decides the doubt in *Fricker v. Tomlinson*, 1 M. & Gr. 773.)

(a) The seventeenth section differs in this respect. (See post, p. 70.)

(b) It is not necessary in pleading to declare that the promise was in writing; it is sufficient to shew that it was so (2 Salk. 519:) neither must the defendant who relies on the fact that there was no written note, plead that defect specially: he may give evidence of it under the general issue, which is a denial of the matters of fact from which the law implies a contract. Therefore, a special plea, that the Statute of Frauds had not been satisfied, would be demurable as an argumentative denial of the contract itself. *Leaf v. Tuton*, 10 M. & W. 393; *Buttemere v. Hayes*, 5 M. & W. 456. See also *Maberly v. Sheppard*, 10 Bing. 99, and *Baldey v. Parker*, 2 B. & C. 44.

tion as well as the promise, the *signature* which the statute requires, and the consequences of not reducing to writing contracts which the statute requires should be so evidenced. It remains, before terminating the consideration of that section of the Act, to say a few words upon each of the five particular species of contracts to which it applies.

The *first is*—*any special promise by an executor or administrator to answer damages out of his own estate.*

The principal case on this subject is *Rann v. Hughes*, which went up to the House of Lords, and is reported in 7 Bro. P. Ca. 556, and 7 T. R.

[*43] *350 n. The point decided in that case is, that the Statute of Frauds in no manner affected the validity of such promises, or rendered them enforceable in any case in which at common law they would not have been so; but merely required that they should be reduced to writing, leaving the written contract to be construed in the same manner as a parol contract would have been had there been no writing. The opinion of the judges was delivered to the House of Lords by L. C. Baron Skynner, and is extremely instructive.(a)

[*44] The next species of promise mentioned in the *fourth section is “*Any special promise to answer for the debt, default or miscarriage of another person.*”

This includes all those promises which we ordinarily denominate *guarantees*, and has given rise to a very great deal of discussion.

In the first place, it has been decided that the sort of promise which the statute means and which must be reduced to writing, is a promise to answer for the *debt, default, or miscarriage of another person, for which that other person himself continues liable.* Thus, if A. go to a shop, and say, “Let B. have what goods he pleases to order, and if he do not pay you, I will,” that is a promise to answer for a debt of B. for which B. himself is also liable, and, if it be sought to enforce it, it must be shewn to have been reduced to writing: but, if A. had said, “Let B. have goods on my account,” or “let B. have goods, and charge me with them:” in these cases, no writing would be required, because B. never would be liable at all, the goods being supplied on A.’s credit and responsibility, though handed by his directions to B. You will find this proposition amply illustrated by *Birkinges v. Durnell*, Salk. 27; *Bird v. Gammon*, 3 B. N. Ca. 889; *Goodman v. Chase*, 1 B. & A. 297; and the notes to *Forth v. Stanton*, 1 Wms. Saund. 211.

Goodman v. Chase presents rather a singular instance of the application

(a) It is thus essential that the consideration for the promise of the executor and administrator should appear, which consideration, as we shall afterwards see under the title of Parties to Contracts, must be other than that which attached to the original liability: it is, in fact, a new contract between new parties, for the executor is nowise bound to perform the contracts of his testator *de bonis propriis*, and, therefore, his promise to do so must be supported by a new consideration. Forbearance to sue an executor for some definite time for a debt due from the testator is a sufficient consideration for a promise by the executor to pay it, although there be no assets. 1 Rol. Abr. 24, pl. 33; *Hawes v. Smith*, 2 Lev. 122. The proving of his debt by the creditor, at the request of the executor, has been held a sufficient consideration, it being “a trouble and charge” to the creditor to do so. 1 Siderfin, 57. Any valid consideration suffices, [see the next lecture on “Considerations,”] and such consideration flowing between the parties, according to the rule in p. 35, ante, must appear on the memorandum. See the notes in 2 Saund. 137 b, and 1 Saund. 209 a.

of the rule of *construction of which I have been speaking. In that case, a debtor had been taken in execution, and Chase, in consideration that the creditor would discharge him out of custody, promised to pay his debt. It was held, that this promise need not be in writing; for that by discharging the debtor out of execution, the debt was gone; it being, as you are probably aware, a rule of law, that if a debtor be once taken in execution and discharged by his creditor's consent, that operates as a satisfaction of the debt; and therefore that the debtor, having ceased to be liable, the promise to pay the amount was not a promise to pay any sum for which another person was responsible, and therefore did not require to be reduced to writing. (a)

* It was at one time thought that a verbal promise even to answer for the debt of another for *which that other remained liable, might be available if founded on an entirely new consideration conferring a distinct benefit upon the party making such promise. This idea is, however, confuted by Serj. Williams in an elaborate note to the case of Forth v. Stanton, which I have already cited; and the rule there laid down by him, and which has ever since been approved of, is, that the only test

(a) The result is thus given at the end of an elaborate note, to which Mr. Smith presently refers, in Williams's Saunders:—The question, whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party *remaining liable*, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise. 1 Saund. 211 c, note l. See also Lane v. Burghart, 1 Q. B. 933; Bird v. Gammon, 3 B. N. C. 883; Bushell v. Beavan, 1 B. N. C. 103.

The principle is not very evident on which the Courts have thus held that the liability of the original party must continue, *after the promise is made*, in order to bring it within the statute. In the first place the words of the statute do not require it; it provides merely that no action shall be brought "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless," &c. Now these words are satisfied by a promise to answer for a debt existing when the promise was made. Nor is it less a promise to answer for that debt, nor does it cease to be one, because the debt may afterwards be no longer recoverable from the person who incurred it; and although the debt be extinguished, the default at any rate remains, and the case in question is precisely that of answering for a "default." But the action is brought upon the *promise*, and not upon the debt or the default; and if it were a debt at the time of the promise, it seems to be within the letter of the statute. It is also within its spirit; for a creditor would not be less likely to set up a fraudulent claim against a third person because he had lost his remedy against the original debtor: therefore, the prevention of fraud and perjury, which the statute was designed to effect, is as much needed in the one case as in the other. It is submitted that the fact that the liability is to be exclusively borne by the guarantor, is an additional reason for requiring written evidence that the promise was advisedly made. The courts, however, have held that it is essential to the operation of this clause, that the undertaking shall be not only collateral at the time it was made, but that it shall continue to be so; and that the original demand shall remain in full force. Lord Ellenborough, C. J., said, in the above-named case of Goodman v. Chase, "By the discharge of the original debtor with the plaintiff's consent, the debt as between those persons is *satisfied*?" * * * * Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase." And upon the distinction between absolute and collateral promises the subsequent decisions have turned. (See Butcher v. Stewart, 11 M. & W. 857, per Parke, B.; Green v. Cresswell, 10 Ad. & Ell. 453, per Lord Denman, C. J.)

Thus the law now is, that where the transaction leaves a continuing liability on the original debtor, as in the case of discontinuance of an action against him, as in Tomlinson v. Gell, then the promise must be in writing; but where it extinguishes or discharges the original debt, and transfers the liability, as in Goodman v. Chase, the promises to pay it to the guarantor need not be in writing, though the debt existed when the promise was made.

and criterion by which to determine whether the promise needs to be in writing is the question whether it is, or is not, a promise to answer for a debt, default, or miscarriage of another for which that other continues liable. If it be so, it must be reduced to writing, nor can the consideration in any case be of importance except in such cases as *Goodwin v. Chase*, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability. (a) You will see *Serj. Williams's* criterion approved of in *Green v. Cresswell*, 10 A. & E. 453, and *Tomlinson v. Gell*, 6 A. & E. 564.

[*48] *In the very late case of *Eastwood v. Kenyon*, 11 A. & E. 446, the Court of Queen's Bench decided a completely new point on the construction of this branch of the fourth section. They held that the *promise*, which is to be reduced *to writing, is a promise made [*49] to the person to whom the original debtor is liable, but that a promise made to the debtor himself, or even a third person, to answer to the creditor, would not require to be reduced to writing. (b)

In determining, however, whether a guarantee has been sufficiently reduced to writing to satisfy the fourth section, the question which most frequently arises is, whether the consideration do or do not sufficiently appear upon the written instrument. That in all cases within the fourth section, the consideration for the promise as well as the promise itself must appear in the written memorandum, has been already explained in the last lecture. It is not, however, absolutely necessary that it should be set down in express terms. It may be collected *by inference* from the entire wording of the written instrument; but then the inference relied on for this purpose must be a probable one, not a mere random guess. (See *Bentham v. Cooper*, 5 M. & W. 128; *Jarvis v. Wilkins*, 7 M. & W. 410; *James v. Williams*, 5 B.

(a) It is so stated in the middle of the note, but less broadly at the end of it, in the last edition; for the cases where the guarantor *has* an interest in his promise have given rise to some conflict of opinion, which Mr. Serj. Williams resolves as just cited (p. 45;) where he couples with the continuing liability of the original party "the absence of any liability on the part of the defendant or his property, except such arises from his express promise;" both of which conditions he holds requisite to bring a guarantee within the statute. Thus, where there is a purchase of an interest by the guarantor, or where the creditor is induced by the promise of the guarantor to surrender a lien or other security for his debt, the relation of the parties is changed; *Chit.* 513; the undertaking assumes the character of an original contract between the guarantor and the creditor; and the case is no longer within the mischief of the statute. (See *Williams v. Leper*, 3 Burr. 1886, and *Thomas v. Williams*, 10 B. & Cr. 664, where the cases are reviewed by *Ld. Tenterden, C. J.*) So, where the goods sold are transferred by consent of the parties to the guarantor, for this is a new sale. (*Browning v. Staltard*, 5 Taunt. 450.) Wherever the guarantor is liable on other grounds than his guarantee, the promise need not be in writing. The liability on the original debt need not have arisen at the time of the promise, provided it arose afterwards, and that it remained; it may be a prospective liability constituting the consideration for the promise. The common case of becoming responsible for goods to be supplied to another on the faith of that promise, is within the statute; likewise, a promise to bear harmless one who shall be bail for another. (See *Green v. Cresswell*, 10 Ad. & Ell. 453.) If the debtor be not liable, whether the debt be present or prospective, neither can the guarantor, as in the case of a contract by an infant not for necessaries. 1 Burr. 373.

(b) The statute applies only to promises made to persons to whom another is already or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the *promisee*. *Hargreaves v. Parsons*, 13 M. & W. 561.

& Ad. 1109; *Hawes v. Armstrong*, 1 Bing. N. C. 761.) To use the expressions of the L. C. J. Tindal in that case:—

*“It is not necessary that the consideration should appear in *express terms*. It would be undoubtedly sufficient, in any case, if the memorandum is so framed that [*50] any person of ordinary capacity must infer from the perusal of it, that such and no other was the consideration upon which the undertaking was given. Not that a mere *conjecture*, however plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum.”

It may be useful in order to impress upon the mind this doctrine, which is of very frequent practical application, to give one or two examples of decided cases in which the consideration for a guarantee has been held to appear sufficiently *by inference* from the other portions of the memorandum, although not stated in express terms.

In *Newbury v. Armstrong*, 6 Bing. 201, the memorandum in writing relied on for the purpose of satisfying the exigency of the fourth section of the statute of Frauds was as follows:—

To Mr. John Newbury.

Sir,

I, the undersigned, do hereby agree to bind myself to you, to be security for S. Corcoran, late in the employ of J. Pearson, of London Wall, for whatever you may entrust him with while in your employ, to the amount of 50*l.*, in case of any default to make the same good.

(Signed)

W. ARMSTRONG.

Here you see is not a word *expressly* said about the consideration for Armstrong's becoming security, and it was objected upon that ground that the writing in question was not a sufficient *memorandum to satisfy the statute. The Court of Common Pleas, however, held, that it was [*51] but a fair inference from the terms of the instrument that the consideration was to be the employment of Corcoran in the service of Newbury. “The words (said the Lord Chief Justice) are all *prospective*: it may fairly be implied, that Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another. Similar to this in principle was the case of *Stapp v. Lill*, 1 Camp. 243, 9 East, 348, where the memorandum relied on was worded thus:—

“I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nicholls of Brick Lane.”

JOHN LILL.

It was decided by Lord Ellenborough first, and afterwards by the whole Court of Queen's Bench, that this instrument was sufficient; for that it might fairly be collected from its terms, that Lill intended the consideration for his own liability to be the delivery of goods by Stapp to Nicholls.

On the other hand, in the well-known case of *Saunders v. Wakefield*, 4 B. & A. 596, the guarantee was as follows:—

“Mr. Wakefield will engage to pay the bill drawn on Pitman in favour of Stephen Saunders.”

This was held insufficient, for it appeared from the memorandum that [*52] the bill was already *drawn, and it did not appear that Wakefield had any thing to do with the drawing, or had requested Saunders to advance any thing upon it, and, consequently, it did not appear that there was any consideration for his promise to pay it.

In all these cases you must recollect that, if verbal evidence had been allowed, it would probably have appeared clear enough that there was a good consideration for the promise sued on ; but as it is indispensably necessary that the consideration should appear, not from such evidence, but from the instrument itself, it became necessary in every case to look narrowly at the words with a view of ascertaining, as in the instance I have just put, whether, though it do not appear in terms, it may not be collected by inference. I think I have sufficiently explained the nature of these inquiries ; but if you think fit to pursue the subject, you may refer to *Raikes v. Todd*, 8 Ad. & Ell. 846 ; *Bentham v. Cooper*, 5 M. & W. 628 ; *Jarvis v. Wilkins*, 7 M. & W. 410 ; *Brooks v. Haigh*, 10 Ad. & Ell. 323 ; and *Kennaway v. Treleavan*, 5 M. & W. 498 ; which are the last decisions on this branch of the law. (a)

(a) In *Kennaway v. Treleavan* the guarantee was thus worded :—"Gentlemen, I hereby guarantee to you the sum of 250*l.* in case Mr. P. should default in his capacity of agent and traveller to you." It was held that the future employment of Mr. P. was the consideration of this promise, and that it sufficiently appeared by inference from the terms of the guarantee. But the case of *Haigh v. Brooks*, 10 Ad. & Ell. 309, is the strongest on this point, and has carried the latitude of inference to its extreme length : it was cited in the recent case of *Chapman v. Sutton*, 15 Law Jour. C. P. 166 ; and the guarantee was thus worded ;—"In consideration of your *being in advance* to Messrs. John Lees and Co. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*) on their behalf;" and it was held, that whether the consideration, "*your being in advance*," was, or was not, a good consideration, depended upon the transaction to which the guarantee referred. Lord Denman, C. J., remarks, "*Being in advance* does not necessarily mean that the plaintiff was in advance at the time of the giving of the guarantee. It may have been intended as prospective." The judgment in the Exchequer Chamber was given upon this ground, and Lord Abinger, C. B., said that "there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract."

Raikes v. Todd, above cited, is a good illustration of an insufficient disclosure of consideration. The guarantee was thus expressed :—"Gentlemen, I hereby undertake to secure to you the payment of any sums of money you *have* advanced, or *may hereafter* advance, to Messrs. Davenport and Co., on their account with you, commencing on the 1st November, 1831, not exceeding 2000*l.*:" here it was held that the guarantee disclosed no consideration for the *past* advances, and was to that extent invalid, but that it was good as regarded the future advances. Thus, if the guarantee consist of severable promises, that which is bad may be rejected without invalidating the remainder of the guarantee. There is no practical difference between past and future considerations, so long as the guarantee discloses a sufficient consideration in law to support the promise (of which see the next lecture.) The consideration need not be co-extensive with the promise. (See *Raikes v. Todd*, per Lord Denman, C. J.) And the Courts will no longer enter into the question of adequacy of the consideration. See *Chapman v. Sutton*, (supra,) which is the last case where the question of the sufficiency of the inference of a consideration has arisen. See also *Lang v. Neville*, 6 Jurist, 217, and *Johnston v. Nicholls*, 1 C. B. 251.

It is permissible to adduce in evidence of the consideration the written correspondence between the parties, if that correspondence has been referred to in the guarantee, but not otherwise. See *Dobell v. Hutchinson*, 3 Ad. & Ell. 355, and *Higgins v. Dixon*, 14 Law Jour. Q. B. 329.

The rules which govern the construction of contracts, and which will be afterwards considered, of course apply to guarantees. But there is one peculiarity attaching to them which it may be well to notice here. Guarantees are either for definite or indefinite sums or periods : where they are not limited as to the amount guaranteed, or, being so limited, are in either case intended to affect future transactions until revoked, they are termed con-

*There is one thing which, though collateral to the Law of Contracts, relates so peculiarly to *this branch of the statute[*53-*54] of Frauds, that I think it ought to be mentioned. After the fourth *section of the statute of Frauds had rendered verbal guarantees unavailable, it became the *fashion in such cases to bring[*55-*56] actions upon the case for *false representations*, under circumstances in which, before the Act, the transaction would have been looked on as one of guarantee. For instance, if A. went to a tradesman to persuade him to supply goods to B. by assuring him that he should be paid for them, the tradesman, in case of B.'s default, could not, it is true, bring an action of *assumpsit* as upon a warranty, because there was no written memorandum of what passed; but he brought an action on the case in which he accused A. of having knowingly deceived him as to B.'s ability to pay: and if the jury thought this case made out (as a jury composed of tradesmen were very apt to do,) he succeeded in his action, and received pretty nearly the same sum as he would have done if there had been a guarantee. However, as this was a palpable evasion of the statute of Frauds, the legislature put an end to it by enacting in statute 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, "that no action shall be brought to charge any person by reason of any representation or assurance made or given concerning or relating to

tinuing guarantees. The distinction between these two classes of guarantee is one of some nicety and often of importance, as regards the sufficiency of the consideration, which again frequently depends upon whether it be past or prospective.

The only safe rule of construction is to give the words used their natural meaning taking into account the attendant circumstances which are admissible in evidence to throw light upon the intent of the parties to the instrument. This rule has been recently applied in the case of *Allnutt v. Ashendon*, 5 M. & Gr. 392, where the guarantee was thus worded:—"I hereby guarantee Mr. John Jennings's account with you for wine and spirits, to the amount of 100*l*." This was held to apply to an existing account; for said Tindal, C. J., "by account I understand the parties to mean some account contained in some ledger or book; and the case shows that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account." In the subsequent case of *Hitchcock v. Humfrey*, 5 M. & Gr. 559, the defendant, having guaranteed the payment of goods to be supplied by the plaintiffs to A. up to the first of July, gave on the 9th of April the following additional guarantee:—"In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied." This was held to be a continuing guarantee: the words "following month" and "preceding month" being held to have a general application, the terms of the first guarantee being taken into account in construing the language of the second. For other cases of the construction put on these instruments, see *Mayer v. Isaac*, 6 M. & W. 605; *Jenkins v. Reynolds*, 3 B. & B. 14; *Allan v. Kenning*, 9 Bing. 618; *Batson v. Spearman*, 9 A. & Ell. 298; *Hargreave v. Smee*, 6 Bing. 244; *Nicholson v. Paget*, 1 C. & M. 48; *Martin v. Wright*, 14 Law Jour. Q. B. 142; and *Johnston v. Nicholls*, *supra*.

The cases turn, as remarked by the Lord Chief Justice in that of *Martin v. Wright*, on the particular terms of each guarantee, and it is therefore impossible to lay down any less general rule of construction than that which we have endeavoured to give.

Promises to answer for tortious defaults are within the operation of the statute as well as guarantees of credit. *Kirkham v. Marter*, 2 B. & Ald. 613, is a leading authority on this point. A. having killed B.'s horse, C. guarantees to B., the owner, to answer for the damage: this was held to be within the statute. Lord C. J. Abbott distinguished this case from that of *Read v. Nash*, 1 Wils. 305, but which Serjeant Williams thinks it overrules. 1 Saund. 211 c., n. 1.

Shares in a Joint Stock Company are mere choses in action, but Railway Shares, it is submitted, inasmuch as they give an interest in land, would fall under the operation of the 4th section.

[*57] *the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, [*sic*] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The effect of this section was much discussed in the great case of *Lyde v. Barnard*, 1 M. & W. 99, the judgments in which deserve a very attentive perusal. (a)

The third of the species of contracts enumerated by the fourth section, and required by it to be evidenced in writing, is,—*Any agreement made in consideration of marriage.*

It certainly would strike any one (except perhaps a lawyer) that a promise by a woman to marry a man in consideration of his promising to marry her, was an agreement made in consideration of marriage. And indeed in *Philpot v. Wallet* it was expressly so decided: that case is reported in 3 Levinz, 65; it was an action of assumpsit for breach of promise of marriage.

[*58] The jury found the promise, and found also that *it had not been reduced to writing. And it was objected, "that this was no promise within the statute of Frauds and Perjuries, for that must be intended "of promises to pay money upon marriages, and not of promises to marry." But the report proceeds to say that to this it was answered and resolved, that this promise is directly within the words of the statute, and not out of the intent, because the promise is, that in consideration the one would marry the other, the other would marry him. However, as Lord Coke has observed, the reason of the law is not always like a man's natural reason; and accordingly the case of *Philpot v. Wallet* has been overruled by *Cork v. Baker*, 1 Str. 34, and it has been decided by that case, and *Harrison v. Cage*, 1 Ld. Raym. 386, that an agreement between two persons to marry is not an agreement in consideration of marriage, but that these terms are confined to promises to do something in consideration of marriage other than the performance of the contract of marriage itself,—a decision which shows how very cautious a man ought to be in pronouncing an opinion upon the construction of any statute.

We now come to the fourth class of promises enumerated by the fourth section, viz.:—*Any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them.*

[*59] These words, you will observe, are exceedingly *large, (b) comprehending not merely an interest in land itself, but an interest concerning it. And the main questions which have arisen have accordingly been, Whether particular contracts falling very near the line, do or do not concern land, so as to fall within these terms. Thus it was held in *Crosby*

(a) The absence of a written memorandum under this statute may be given in evidence under the general issue, and must not be specially pleaded. *Turnley v. Macgregor*, 6 Scott, N. R. 906.

Representations made by one partner of a firm with respect to its credit are within the statute; (*Devaux v. Steinkeller*, 6 B. N. C. 84;) and statements as to the circumstances of the party to whom credit is given are within the 9 Geo. 4, c. 14, if made so as to convey the belief that he may be trusted. *Swan v. Phillips*, 8 Ad. & Ell. 457.

(b) The words of the clause are as follow: that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

v. Wadsworth, 6 East, 602, that an agreement conferring an exclusive right to the vesture of land during a limited time and for given purposes, is a contract or sale of an interest in, or at least *concerning* lands; and for the non-performance of which, if made by parol, an action cannot be maintained. So, in the Earl of Falmouth v. Thomas, 1 Cr. & Mee. 110, where an incoming tenant agreed to take the crops from the outgoing tenant at a valuation, this was held to be an agreement relating to land. In Tyler v. Bennett, 5 Ad. & Ell. 377, an agreement that the plaintiff should be allowed to take water from a particular well was held to concern land, and to require a writing. On the other hand, in Evans v. Roberts, 5 B. & C. 829, where the plaintiff had sold to the defendant a growing crop of potatoes, this was decided not to be a *sale of any *interest in or concerning land*. It was contended that as the potatoes were deriving nourishment and [*60] support from the soil, and would have passed as part of the land by a conveyance of it, an interest in them must at all events be taken to *concern* land; and great reliance was placed on the decision in Crosby v. Wadsworth, 6 East, 602, which I have already cited; and where a growing crop of grass was sold and was to be mowed by the vendee, the sale was held to fall within the statute, and require a writing. However, the Court held that that case was distinguishable.

"Although," said Mr. Justice Holroyd, "the vendor might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in land within the meaning of this statute; he clearly had no interest so as to entitle him to the possession for any period, however limited, for he was not to raise the potatoes. Besides, this was not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract any interest in any specific portion of the land; the contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away."

With regard to this case, it is worth while to observe, that though, according to the decision of the Court, the contract did not fall within the fourth section, as the sale of an interest in or concerning lands, yet it would clearly fall within the seventeenth, to which, before the conclusion [*61] *of the course, I shall have occasion to advert, as being a sale of goods and chattels: but no point arose upon that section, because one shilling had been paid as *earnest money*, which is one of the modes of satisfying the provisions of the seventeenth section.

I think the examples I have given are sufficient to explain to you the general nature of the points which arise on this part of the section. If you desire to pursue the subject, you may refer to Warwick v. Bruce, 2 M. & S. 205; Jones v. Flint, 10 Ad. & Ell. 753; and Sainsbury v. Matthews, 4 M. & W. 343.(a)

(a) The result of the cases above cited is stated in the last edition of Williams's Saunders, in an elaborate note to the case of Duppa v. Mayo, 277 c. n. f., and is to the effect that no contract is within the statute which does not "give the buyer an interest in the land;" that a mere easement of the right to enter the land for the purpose of harvesting, and carrying away emblements or *fructus industriales* (i. e. the product of labour and industry, such as corn, potatoes, &c., not being the spontaneous growth of the soil,) whether they have arrived at maturity or not, is not an interest in land; and that a contract for the sale of such produce, being a mere sale of goods, need not be in writing. The decision in Crosby v. Wordsworth, respecting a vesture of the land, and Evans v. Roberts

[*62-*63] *In all these cases, however, the observation applies which I have made in the former lecture *with reference to the cases falling within this section in general. The contract, even if by mere words, is not void, but merely incapable of being enforced by action. And therefore it has been held, that if it actually has been executed, for instance in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price as for goods sold and delivered. (See *Parker v. Staniland*, 11 East, 362; *Poulter v. Killingbeck*, 1 B. & P. 397; and see the judgment in *Teal v. Auty*, 2 B. & Bing. 99.)

A curious point has been decided upon this section with reference to a parol demise of land. Such a demise, if not for more than three years, is good within the first section of the statute of Frauds,^(a) the second section [*64] containing, as I *stated in the last lecture, express words preserving the operation of such leases. But an *Agreement* for such a lease falls, not within the first, but within the fourth section; for it is an

and *Parker v. Staniland*, 11 East, 363, as to potatoes, are in accordance with this rule, which is confirmed by the Court of Queen's Bench in the case of *Jones v. Flint*, where the agreement was for the sale of a crop of growing corn and potatoes, and the eatage of grass; and where the ground of decision is expressly stated to be "the legal character of the principal subject-matter of sale, and the consideration *whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land.* Tried by these tests we think that if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels."

When Mr. Smith's lecture was written this was the latest decision on the subject. But it is impossible to reconcile the rule thus laid down with the still later decision of the Court of Exchequer in the case of *Rowdell v. Phillips*, 9 M. & W. 501, which was on an agreement for the sale of growing fruit and vegetables, in which the same question arose under the Stamp Act, 55 Geo. 3, c. 184. The judgment, after *Curia adv. vult*, contains this passage:—

"There is a great variety of cases, in which a distinction is made between the sale of growing crops and the sale of an interest in land; and it must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other. It is sufficient, however, for us to say, that we think this case ought not to be governed by any of those in which it is decided that a sale of growing crops is a sale of goods and chattels. Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person. Undoubtedly there is a case (*Smith v. Surman*, 9 B. & Cr. 561.) in which it appears that a contract to sell timber growing was held not to convey any interest in the land; but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled."

In this case a right of entry to take away the fruit alone was given to the buyer. The rule now, therefore, depends less upon the distinction between the industrial and natural productions of the soil, than upon the question whether the subject-matter of the sale would pass, as incidental to the realty, to the heir, or as personally to the executor. Whatever would pass to the heir is such an interest in the lands as falls within the statute. The rule, however, is not complete, for there are emblements which do not pass to the heir, and yet which may be said to partake of an interest in the land, and to the realization of which the land is essential.

(a) The first section enacts that "all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, or tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding."

agreement for an interest in lands ; and, therefore, though a lease for a year would be perfectly good, though made verbally, an agreement for such a lease cannot be enforced. That was the point decided in *Edge v. Strafford*, 1 Tyrwh. 293.

"It may be said," said Baron Bayley, delivering the judgment of the Court in that case, "that it is strange that the second section of the statute has made a lease for less than three years from the making valid ; and yet, that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease ; or, secondly, this distinction might not have contemplated, but may be the result of the true construction of the statute of Frauds. The first section of that statute provides, all leases, estates, intercs of freehold, or term of years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only, and excepts nevertheless all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the *full improved value. The fourth section enacts, that 'no action shall be brought whereby to charge the defendant upon [*65] any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum thereof, be in writing.' Is, then, the agreement on which this action is brought, 'a contract and an interest in lands ?' *Inman v. Stamp* says distinctly it is : unless that case be successfully impeached, it must govern the present."

Inman v. Stamp, the authority referred to in this judgment, is reported in 1 Stark. N. P. C. 12. It distinctly decided that an agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, was an agreement for an interest in land within the fourth section. In this it was inconsistent with *Riley v. Hicks*, 1 Str. 651, which must therefore be considered overruled by *Edge v. Strafford*. (See further as to lodgings, *Buttermere v. Hays*, 5 M. & W. 456 ; *Mechelen v. Wallace*, 7 A. & E. 49 ; *Lord Bolton v. Tomlin*, 5 A. & E. 856.)

The last case provided for is that of *any agreement that is not to be performed within the space of one year from the making thereof*. It has been decided that the *agreements* meant by this section are not *agreements* which may or may not happen to be performed within a year, but *agreements* which on the face of them contemplate a longer delay than a year before their accomplishment. *Peter v. Crompton, Skinner*, 353, the case usually cited as establishing this distinction, affords also a very good illustration of it. It was an action upon an agreement in which the defendant *promised for one guinea to give the plaintiff ten on the day of his marriage. The case was tried before Lord Holt, who reserved the [*66] question whether a writing was necessary for the opinion of all the judges, a majority of whom were of opinion "that, where the agreement is to be "performed upon a contingency, and it does not appear within the agreement "that it is to be performed *after* the year, there a note in writing is not "necessary, for the contingency might happen *after* the year ; but where "it appears by the whole tenor of the agreement that it is to be performed "after the year, there a note in writing is necessary, otherwise not." There was a difference of opinion among the judges in this case, and it is remarkable that Lord Holt himself differed from the majority. However,

their construction has been frequently adopted since that time; *Fenton v. Emblers*, 3 Burr. 1281; *Wells v. Horton*, 4 Bing. 40.

One consequence of this section is, that if a servant be hired for a year, and the service is to commence at a future time, the agreement ought to be in writing, since it will not be performed within a year. (*Bracegirdle v.*

[*67] *Heald*, 1 B. & A. 722.) (a) Other instances of the application of *this section will be found in *Boydell v. Drummond*, 11 E. 142, the facts of which I have already stated in a former lecture; and *Birch v. The Earl of Liverpool*, 9 B. & C. 392. (b)

[*68] *I have now gone through the five cases to which the fourth section of the Statute of Frauds applies, and in which it requires a written memorandum of the contract. There are one or two other cases of very considerable importance in practice on which I shall briefly observe in the next lecture, in which a writing is required by the express enactment of the legislature. Having mentioned them, I shall say something of the *consideration* upon which a simple contract may be grounded, and which is, as you are aware, an essential part of such contract; and then having finished the remarks I had to make on Simple Contracts exclusively, shall resume the consideration of the general law of contracts, and shall speak of the *competency* or *incompetency* of the contracting parties, and of *remedies* by which in case of breach of contract, their performance is to be enforced.

(a) Where the terms of the hiring on the face of them extend over a period longer than a year, no parol statements or subsequent acts, such as the payment of quarterly wages, can vary the effect of the written document. *Geraud v. Richmond*, 15 Law Jour. C. P. 180. But where it is expressed in short and in complete terms, as we have previously seen, parol evidence of the situation of the parties is admissible to explain what is *per se* unintelligible. *Sweet v. Lee*, 3 M. & Gr. 452.

(b) The statute applies only to agreements of which the entire performance by both parties, in their contemplation, as gathered from the scope and terms of the memorandum, *must necessarily extend beyond the year*. To this extent has the doctrine laid down in *Boydell v. Drummond*, been applied in the very recent case of *Souch v. Strawbridge*, 15 Law Jour. C. P. 170, where the agreement was that the plaintiff should keep the defendant's child so long as the defendant should think proper; and he did keep it for some years. This was held not to require a written memorandum, for "the object of the statute (said Tindal, C. J.) was to prevent frauds by perjury and subornation of perjury, which might set up promises by word of mouth to serve for a long period of years, or to enter into a partnership for life, or promises of a similar nature. The statute merely says, that a party shall not be hurt by evidence of parol promises of such a nature as that. * * * Looking at the terms here, I see nothing which *must necessarily* extend the agreement beyond the year. If there be an agreement to serve for two years, that is undoubtedly within the statute; but if the agreement be to serve, and that such service may be put an end to on a month's notice, it is not within it." The same case decides that no agreement having reference to an executed consideration is within the statute; the agreement must be prospective, not retrospective.

A contemplated performance of the agreement by either of the parties within the year will take it out of the statute. In the case, for instance, of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods within the year. (*Donellan v. Read*, 3 B. & Ad. 899.) If either party is to perform his part of the agreement, therefore, within the year, it need not be in writing.

LECTURE IV. [69]

SALE OF GOODS ETC., UNDER THE 17TH SECTION OF THE STATUTE OF FRAUDS.
—CONSIDERATION OF CONTRACTS BY DEED AND OF SIMPLE CONTRACTS.

I CONCLUDED in the last lecture the consideration of the five cases in which the fourth section of the statute of Frauds renders it necessary that a contract should be reduced to writing. There are, as I then said, one or two other cases, which, being of constant occurrence, it will be right to specify before proceeding to the next branch of the subject.

The first of these cases is that of a sale for the price of 10*l.* or upwards, regarding which the seventeenth section of the statute of Frauds has provided as follows:—

“No contract, for the sale of any goods, wares, or merchandize, (a) for the price of 10*l.* or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

The first great difference which you will observe between this section and the fourth section of the same act is, that the fourth section *renders a writing *necessary* in all cases which fall within its terms; [*70] whereas the seventeenth mentions three circumstances, any one of which it directs shall be as effectual as a writing, namely, *acceptance of any part of the goods*, *payment of part of the price*, and Thirdly, the *giving something by way of earnest* to bind the bargain; any one of which three things will as effectually perfect the sale as a writing would. Where none of these has taken place, a writing, however, becomes necessary; and if there be none, the bargain is void, and there is no sale: for, to use the words of Mr. J. Bosanquet in *Laythroap v. Bryant*, “the fourth section does not avoid contracts not signed in the manner described; it only precludes the right of action. The seventeenth section is stronger, and *avoids* contracts not made in the manner prescribed.” A parol sale, therefore, unaided by any of the three formalities mentioned in the seventeenth section as equivalent to writing, is totally and entirely void. A doubt was entertained at one period whether the seventeenth section included the case of a contract for something not in existence in a chattel estate at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery. Where, for instance, growing timber was bargained for, to be delivered cut into planks, or a ship or a carriage not yet built. However, any doubt that formerly existed on this subject is *now put an end to, for by [*71] stat. 9 Geo. 4, c. 14, s. 7, it is enacted, that the seventeenth section of the statute of Frauds

“Shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or

(a) See *Humble v. Mitchell*, 11 Ad. & Ell. 205.

ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.^(a)

(a) Much litigation has arisen on what constitutes acceptance such as to satisfy the statute. Acceptance by the buyer of goods is in all cases essential to give the seller of them a right of action upon the contract; nor is there any difference in the sort of acceptance required in such cases, whether they are or are not within the operation of this statute. In order to an acceptance by the buyer there must have been a delivery by the seller; and there must be both in order to satisfy this clause of the seventeenth section.

A delivery of goods must be an actual transfer of the possession to the buyer by the seller, with an intent thereby to pass the property, so as to deprive himself of the right of lien for the price of them. Thus, where goods are merely placed in the hands of a del credere agent, though ordered by the buyer, who directs them to be marked with his mark, this is no delivery, for the agent, not being the buyer's agent but the seller's, the seller has not parted with the possession or divested himself of the property in the goods. (*Bill v. Baiment*, 9 M. & W. 36; *Baldev v. Parker*, 2 B. & Cr. 37.) Even a delivery order for goods upon a dock company, given by the seller to the buyer, would not constitute delivery, according to *Abbott, C. J.*, "until the dock company had accepted the seller's delivery order, and by so doing, assented to hold the wine, as the agents of the buyer." (*Bentall v. Burn*, 3 B. & C. 423.) On the same principle, a transfer of wine, sold by parol, in the books of the *London Dock Company*, would, if made by the vendee's assent, amount to a symbolical delivery. (*Proctor v. Jones*, 2 C. & P. 535, per *Best, C. J.*) And where the plaintiff, who was a horse dealer and livery-stable keeper, offered two of his horses for sale to the defendant, who sent word that "the horses were his, but, that as he had neither servant nor stable, the plaintiff must keep them at livery for him;" and the plaintiff accordingly removed the horses out of his sale stable into another stable, this was held to be a sufficient delivery, the plaintiff having thereby given up his lien for the price, and retained the horses merely at livery for the buyer. *Elmore v. Stone*, 1 Taunt. 458.

Where goods are delivered to a third party, as to a carrier or wharfinger, the question of delivery must depend upon the question whether such third party was appointed by the buyer; if so, delivery to such carrier or wharfinger would be delivery to the buyer. (*Richardson v. Dunn*, 2 Q. B. 218; *Dawes v. Peck*, 8 T. R. 330.) Where the goods are sent to a third party, or a place not belonging to but customarily used by the buyer, the question must be determined by the principle we have stated, and the question whether the seller does or does not retain a power over them inconsistent with the property being in the buyer. *Dodsley v. Varley*, 12 A. & E. 632.

The delivery of a portion or sample of the goods sold will suffice where it is intended thereby to invest the buyer with the property in them. (*Hinde v. Whitehouse*, 7 East, 558.) In all cases the goods must be received by the buyer, or some one as his agent, to constitute delivery.

Delivery implies receipt, but not acceptance. Nothing can be more distinct than the receipt and acceptance of goods: for the latter means such an acceptance as affords the purchaser reasonable time and opportunity to examine both the quality and quantity of the goods delivered: such a possession as precludes him from any longer objecting to the goods alone satisfies the statute, and dispenses with a written memorandum. There cannot, therefore, be acceptance without receipt, but there is often receipt without acceptance. See *Howe v. Palmer*, 3 B. & Ald. 326; *Hanson v. Armitage*, 5 B. & Ald. 557, and *Johnson v. Dodgson*, 2 M. & W. 656, where *Lord Abinger, C. B.* puts the case thus:—"If the purchaser sent his own servant for the goods, and when they were brought, sent them back, as not answering the contract, he could not be said to accept them." (See also *Maberley v. Sheppard*, 10 Bing. 99, and *Baldev v. Parker*, 2 B. & Cr. 440.)

Wherever the buyer has dealt with the goods as his own, either by using or reselling them, he cannot afterwards repudiate the contract, and the acceptance is complete: such evidence must be unequivocal, and the question whether it is so or not, under all the circumstances, is fact for the jury rather than matter of law. *Eden v. Dudfield*, 1 Q. B. 302; *Chapman v. Morton*, 11 M. & W. 534, are among the most recent decisions on this point.

The buyer may also accept by lapse of time after the receipt of the goods. It is distinctly stated in the judgment of *Lord Abinger, C. B.* in *Chapman v. Morton*, that if the buyer intends to renounce the contract, he ought to give the plaintiffs distinct notice at once that he repudiates the goods, and not prevent the sellers from dealing with them as theirs. In *Richardson v. Dunn*, where a smaller quantity of coals than were ordered were shipped to the purchaser in a vessel other than that named by him, and an invoice and letter were sent to him stating the facts; it was there held by the Court of Queen's Bench, that "silence for a week" on the part of the buyer was "tantamount to assent;" and he was liable in assumpsit for the price of the goods. (See also *Coleman v. Gibson*,

*Where a writing is relied on to satisfy the provisions of the seventeenth section, the rules *which govern the case are very [*72-*73]

1 M. & Rob. 168.) The same doctrine was applied in the case of *Bushel v. Wheeler*, 8 Jurist, 532, to acceptance under the seventeenth section of the statute of Frauds. Where goods were placed in the warehouse of a carrier selected by the purchaser, who allowed them to remain there six or seven months, when he informed the warehouseman that he did not intend to take them; and this was held to justify the jury in finding an acceptance,—a constructive though not a manual one. Subsequently the Court of Exchequer stated a different doctrine in the case of *Norman v. Phillips*, 14 M. & W. 277, where the buyer, under precisely similar circumstances, had allowed goods to remain at a station of the Great Western Railway, where he had desired them to be sent, informing the people there that he should not take them at the time, but allowing eight weeks to elapse before he apprised the seller of the repudiation. The Court held that this was an evidence on which the jury ought not to have found an acceptance, because the goods were not in the possession of the party himself, or an agent authorized by him to examine the quality of the goods, but merely of a carrier, who was an agent only for the purpose of carrying; and that he, not being an agent to accept the goods in the first instance, could not become so by lapse of time (per Alderson, B.) It is difficult to reconcile this decision with the principle established in the previous judgments. The seller had completed the delivery; for he had delivered precisely as he had been directed to do by the buyer; his lien and power of stoppage *in transitu* were gone (see *Wilmhurst v. Bowker*, in error, 7 M. & Gr. 882;) he had wholly parted with his property in and control over the goods, and had appropriated them to the purchaser (see *Wilkins v. Bromhead*, 6 M. & Gr. 963,) who had full power to examine them; and his not having done so was entirely his own act and default. If the carrier was not the party to examine nor an agent to accept, neither was he to repudiate; and there can be little question that eight weeks' silence is an unreasonable delay, especially when an invoice of the goods had been received; and this is perfectly consistent with the law as laid down in *Johnson v. Dodgson*, *supra*. It is humbly submitted that the current of previous decisions will prevail; and that wherever the seller has done his part in delivering the goods sold into the control or possession of the buyer, in accordance with the directions given by him, after the lapse of a reasonable time for their examination, there is an implied assent to keep them; and if no repudiation of the contract be then made to the seller, the acceptance is complete. What is reasonable time must be always a question for the jury, having regard to the nature of the goods and the usages of trade. Any other doctrine would seriously disturb the accustomed transactions of commerce. For the remaining points relating to Delivery and Acceptance, not under the statute of Frauds, see post, tit. Sale of Goods.

Wherever different goods, or several classes of the same goods, are bought at the same time, and form one contract, acceptance of part is acceptance of the whole. (*Elliot v. Thomas*, 3 M. & W. 170, and *Williams v. Burgess*, 10 Ad. & Ell. 499.) And if a man enters into an entire and single agreement for goods made and others to be made, his accepting part of the goods made is evidence of the whole agreement and of acceptance, and will take the case out of the statutes, both as respects the goods made and those to be made; see *Scott v. Eastern Counties Railway*, 12 M. & W. 33, where Lord Abinger, C. B. says, "Can it be said that if a man goes to a tailor's shop, and buys a suit of clothes which are ready made, and at the same time orders another suit to be made for him, and the former are sent home to and accepted by him, he is not bound to pay for the latter? The two statutes (the statute of Frauds and the 9 Geo. 4, c. 14, s. 7,) that have been referred to, must be construed as incorporated together; and then it is plain that where an order for goods made, and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the statutes as regards the latter also." It is obvious that this rule precludes the principle of giving an opportunity to object to quality as regards the goods to be made; but such is the law at present.

Where goods are sold in distinct lots, as by auction, acceptance of one lot by no means constitutes acceptance of another. They form separate contracts. (*Roots v. Lord Dorman*, 4 B. & Ad. 77.) So where distinct terms attach to the bargain for different articles though bought at the same time, there is no longer an entire contract, and acceptance of one article is not acceptance of the other. (*Price v. Lea*, 1 B. & Cr. 156.) Acceptance of samples constituting a part of the bulk sold to the buyer, takes the whole contract out of the statute. (*Hinde v. Whitehouse*, 7 East, 570.)

Earnest or payment of part of the purchase money equally satisfies the statute, however small the sum paid may be. It is obviously attended by few of the niceties which beset the principle of acceptance, nor does it transfer control over the goods possessed by the seller, whose lien remains unimpaired. (*Goodall v. Skelton*, 2 H. Blacks. 316.) Ear-

[*74] analogous to those which I have already stated with regard to *the fourth. The signature must be by the party to be *charged* or his agent, (a) as in cases arising* under the fourth section; but [*75-*76] neither under the fourth nor the seventeenth sections is there any *necessity for the agent's being appointed by writing. Under the seventeenth section, as well as under the fourth, several documents may be read together as making up the contract, provided they be sufficiently connected in sense among themselves without the aid of parol *evidence [*77] (see *Phillimore v. Barry*, 1 Camp. 513; *Jackson v. Lowe*, 1 Bing. 9.) It was indeed said by Lord Ellenborough in *Egerton v. Matthews*, 6 East, 307, (b) that the word *Bargain*, used in this section, does not render so strict a statement of the transaction necessary, as the word *Agreement*, used in the fourth of matters within that section. It has, however, been decided that the names of both *parties* must appear in the *memorandum*, though the signature of the party *to be bound* alone is requisite; for, as the Court observed, there cannot be a *bargain* without two parties, and, therefore, a memorandum naming one only, is not a memorandum of a bargain. *Champion v. Plummer*, 1 B. & P. 252. And the price ought to be stated, if one was agreed on, for that is part of the bargain. *Elmore v. Kingscote*, 5 B. & C. 583. If none be named, the parties must be understood to *have agreed for what the thing is reasonably worth. (c)

Another case in which the legislature has required that a particular contract should be made in writing, is, *that in which a certificated bankrupt promises to pay a debt from which his bankruptcy and certificate had discharged him*. A promise to pay such a debt is valid, for the existence of debt is a consideration for making such a promise, even though the *remedy* which originally existed for its recovery has been taken away by the bankruptcy; see *Trueman v. Fenton*, Cowp. 544. But as it was considered by the legislature desirable to prevent bankrupts from carelessly and improvidently reviving by fresh promises those demands from which it is the policy of the Bankrupt Laws to discharge them, statute 5 & 6 Vict. c. 122, s. 43, enacts

"That no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such contract or agreement be in writing, signed by the bankrupt or by some person lawfully authorized in writing by the bankrupt."

nest merely binds the bargain, and satisfies the statute of Frauds, (see *Blenkinsop v. Clayton*, 7 Taunt. 597,) although it seems an unsettled question how far payment of earnest transfers the right of property. *Back v. Owen*, 5 T. R. 409, and Bull. N. P. 50.

(a) It may be written any where, as long as it was the intent of the party that it should operate as a memorandum. *Johnson v. Dodgson*, *supra*.

(b) See also other instances of the same rule in *Gosbell v. Archer*, 2 Ad. & Ell. 500; *Cooper v. Smith*, 15 East, 103; *Johnson v. Dodgson*, *supra*; *Dobell v. Hutchinson*, 3 Ad. & Ell. 355; *Laythoarp v. Bryant*, 2 B. N. C. 735.

Bought and sold notes fall under the same category, and if they agree, bind the contract, (*Gregson v. Ruck*, 4 Q. B. 737;) but where they vary, the broker's book cannot be referred to, and there is no contract, (*Grant v. Fletcher*, 5 B. & C. 436; *Hawes v. Forster*, 1 Moo. & Rob. 368,) unless it be shown that a broker's book was known to the parties. *Thornton v. Charles*, 9 M. & W. 809, per Lord Abinger, C. B. See *Pitts v. Beckett*, 13 M. & W. 743. See also *Trueman v. Loder*, 11 Ad. & Ell. 589.

(c) Thus an order for goods "on moderate terms" is a sufficient memorandum within the seventeenth section of the statute of Frauds. *Ashcroft v. Morrin*, 4 M. & Gr. 450.

There was a precisely similar clause in stat. 6 Geo. 4, c. 16, except that the word *allowed* was *used instead of *confirmed*. The effect of [*79] this is, that a bankrupt may still, by a new promise, bind himself to pay a demand proveable under his bankruptcy, but that new promise must be reduced to writing, and signed by himself, or his agent authorized in writing.

Another case provided for by express enactment is that of *an infant*. There are many contracts which, when entered into by an infant under the age of twenty-one years, are invalid, as I shall have occasion to explain to you at greater length when I arrive at that part of the subject which relates to the *competency* of parties to contracts, but which are capable of being ratified by the infant when he arrives at his full age of twenty-one. This ratification might, at common law, have been by parol, but by 9 Geo. 4. c. 14, s. 5, no action shall be maintained whereby to charge any person upon any promise made *after full age* to pay any debt contracted *during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, *unless* such promise or ratification be *in writing*, signed by the party to be charged therewith. See on the construction of this Act, *Hartley v. Wharton*, 11 A. & E. 934.(a)

*Another case is that of a promise to pay a debt barred by the Statute of Limitations; but as I shall have occasion to speak again [*80] of that statute before the conclusion of the lecture, I shall reserve what I have to say regarding the writing by which its operation may be defeated.

Now these are the principal cases in which the law of England requires that particular contracts should be reduced to writing, not that they are the only ones, for there are many statutes making writing necessary in certain particular transactions, but these are the cases of most frequent occurrence, and therefore fittest to be here mentioned.

Having now therefore pointed out to you the practical distinction which exists between written *and verbal contracts, though both of them alike, if not sealed and delivered, rank but as *simple contracts* in [*81] the eye of the law, it is time to touch on some points which apply to all simple contracts alike; and the first and most important is, on the *consideration* by which they are supported.

I have already stated to you that one of the main distinctions between a contract by *deed* and a simple contract is, that *the latter requires a consideration to support it*, the former not. And here it is proper to observe, incidentally, that, when I say that a contract by deed does not require a con-

(a) The memorandum in that case was without date or address, and was thus worded—“I am sorry to give you so much trouble in calling; but I am not prepared for you: but will without neglect remit you in a short time.” This was held sufficient, it being not necessary that the sum should be named, or that the plaintiff should shew the defendant to be of age when he gave the note. Neither need the party to whom the promise is given appear, but may be supplied by oral evidence. “The effective words, said Lord Denman, C. J., ‘in the Act are ‘promise’ and ‘ratification.’ The mischief to be provided against was, not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment.” Coleridge, J. yielded to the authorities with great reluctance (*Bird v. Gammon*, 8 B. N. C. 883; and *Diekenson v. Hatfield*, 1 M. & Rob. 141, as to the sum, and *Edmund v. Downes*, 2 C. & M. 459, as to the date), and said it was “one of a class by which a statute had been frittered away, in order to comply with the ordinary habits of men. It is common to send letters in envelopes: the statute is therefore construed so as not to interfere with this custom.”

sideration to support it, I mean to say that it does not require a consideration for the purpose of binding the party who executes it, and rendering him liable. I do not by any means intend that you should understand that a consideration may not come to be a most important ingredient in a contract by deed, as between parties claiming a benefit under that deed, and other parties having conflicting claims upon the person executing it. For instance, the statute of the 13th Eliz. c. 5, renders a great variety of deeds (if made without a valuable consideration) void as against creditors; and this statute (which Lord Mansfield has said is only declaratory of the Common Law) is founded on a perfectly righteous and equitable principle: for how absurd and unjust would it be to allow a man to defeat the claims of [*82] his real creditors by entering *into obligations to persons who had never parted with any value at all. When, therefore, I say that a deed is good *without consideration*, I do not mean to say that it stands for all purposes on the same footing as an instrument for which value has passed; but what I mean that you should understand is this—that, where the interests of third parties are not affected, but the question is between the person who entered into the contract and the person with whom it is made, there a man cannot defend himself against a promise made by deed by saying that he received no consideration for it, although he might defend himself upon that ground against the very same promise if it had been made by simple contract. I cannot, I think, put a better example of this than that which I put in a former lecture:—A. owes B. 50*l*. Now if I write upon a piece of paper as follows:

“I promise A. that I will discharge for him the debt due from him to B.,”

and give him the paper so written, here is a simple contract without any consideration for it; and, if I fail to perform the promise, no action will lie against me, because a simple contract founded upon no consideration cannot be enforced: and yet, if I had sealed that very slip of paper, and delivered it to A. as my act and deed, an action of covenant would have lain against me had I afterwards failed in performing it; and [*83] *to that action it would have been no defence to say that I received no consideration for my undertaking: I might say that I had been imposed upon, and persuaded to execute it by A.'s fraud, or I might say, that the debt due to B. was an illegal one, and that my promise was made in pursuance of an illegal arrangement: but that the promise was without consideration would be a defence of which, the contract being by a deed, I could not be allowed to avail myself.

Here I am tempted to digress for a moment or two from the main course of the subject, for the imaginary case I have first put reminds me of a real and a very curious point which has been recently decided in the Court of the Queen's Bench. The case I put, you will observe, was this:—A. owes B. 50*l*. I write and sign a sheet of paper in these words;—

“I promise to A. to discharge *the debt due from him to B.*”

Now this promise, if I have received no consideration for it, is, as I have said, merely void. But suppose I *have* received a consideration for it,—will it

be binding on me then? Suppose, for instance, A. has given me a horse or a diamond ring as a consideration for my undertaking the responsibility,—can my promise be enforced even in that case? Now, at the first statement of the question, I dare say that you feel surprise that it ever should have been made a question at all; *but a moment's reflection will suffice to shew you why it not only was a question, but a very doubtful one. [*84] The fourth section of the statute of Frauds, you will remember, among the five sorts of *agreement*, which it directs should be evidenced by writing, comprehends *any promise to answer for the debt of another*. Now in the case I have been putting there is a debt due from A. to B., and my promise is a promise to A. to pay it; and though I have supposed the promise to be in writing, and signed, and to be founded upon a sufficient consideration—say the horse or the ring,—still it is not such a writing as would satisfy the statute of Frauds, for that writing, as I shewed you in a former lecture from the authorities, must shew the consideration as well as the promise; and in the case which I have put, the writing simply contains a signed promise to A. to discharge his debt to B., but neither expressly nor impliedly mentions or alludes to any consideration at all. If, therefore, the case be within the statute of Frauds, no action is maintainable upon that promise, although founded upon a good and valuable consideration; so that the question, you see, reduces itself simply to this point,—Is such a promise, that is, Is a promise to pay another man's debt, made, not to the person to whom it is due, but to the debtor himself, a promise to answer for the debt of another within the *meaning* of the fourth section of the statute of Frauds,—I say, within the *meaning* *for that it comes within the *words*, literally [*85] understood, is obvious.

It is a singular thing that this question never should have received a judicial decision until it came before the Court of Queen's Bench a short time since, in the case of *Eastwood v. Kenyon*, which is now reported in 11 Ad. & Ell. 438. In that case the plaintiff was liable to a Mr. Blackburne on a promissory note, and the defendant promised *the plaintiff* to discharge the note to Blackburne. The Court held, that this was not to be a promise to answer for the debt of another within the meaning of the fourth section of the statute of Frauds.

"If," said Lord Denman, "the promise had been made to Blackburne, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz. the debtor and not the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to *promises made to the person to whom another is answerable*. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute, which is now sought to be established, and which we think not to be the true one."

To return to a subject from which I digressed for the purpose of mentioning this point, and the decision upon it. A simple contract is, as I have said, incapable of becoming the subject of an action unless supported by a consideration. **Ex nudo pacto, non oritur actio* is an old and well established maxim of our law, as well as of the civil law, and has [*86] been illustrated by a great variety of cases from time to time: thus it has been

laid down by Lord Kenyon in *Harris v. Watson*, Peake, 72, that a promise made by a captain of a ship to one of his seamen, when the ship was in extraordinary danger, to pay him an extra sum of money as an inducement to extra exertion, was a void promise, because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise except that which the seaman was bound to do before.

The reason for the strictness with which this rule of law—that there must be a consideration to support a simple contract—is enforced, is to guard persons against the effects of their own improvidence in entering hastily and inconsiderately into engagements which may prove ruinous to them. The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed; and it is thought that a deed being an instrument requiring somewhat more of ceremony and formality in its concoction, more opportunity for reflection is afforded to the party executing it than to a person entering into a simple contract, and, consequently, that it is not unreasonable to attribute to it a more stringent operation.

[*87] *The reason of the law of England on this point—one of the most important in our entire system—is exceedingly well explained in the judgment of the Court of Queen's Bench, in *Eastwood v. Kenyon*, the case which I before mentioned with reference to the fourth section of the statute of Frauds.

"The L. C. J. remarks in that case that 'the eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*, 5 Taunt. 36, (and who were the present Lord Wynford and Sergeant Lens) had spoken in their argument of Lord Mansfield as having considered the rule of *nudum pactum* too narrow; and maintained that all promises deliberately made ought to be binding at law, as they certainly are in honour and conscience. But,' his lordship continues, 'the enforcement of such promises at law, however plausibly recommended by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society—one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would be also multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.'"

Now with regard to the question—*What does the law of England recognise as a consideration capable of supporting a simple contract?* The best and most practical answer is,—*Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.* Sir Wm. Blackstone, indeed, in the 2nd vol. of his Commentaries, 444, following the arrangement of the civilians, divides

[*88] *Considerations into four classes: 1st. *Do ut des*, where I give something that something may be given to me; 2d, *Facio ut facias*, where I do something that something may be done for me; 3d. *Facio ut des*, where I do something that something may be given me: and 4th, *Do ut facias*, where I give something that something may be done for me. Divisions of this sort are useful for the sake of arranging our ideas, and testing their clearness: but the short practical rule is, as I have said, that *any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon, him to whom it is made, is a*

sufficient consideration in the eye of the law to sustain an *assumpsit*. (a) Thus, let us suppose I promise to *pay B. 50*l.* at Christmas. Now there must be a consideration to sustain this promise. It may [*89]

(a) The consideration is the cause of the contract. Plowden, citing the civil law, gives this definition:—"Nudum pactum est ubi nulla subest *causa* præter conventionem; sed ubi subest causa fit obligatio et parit actionem." (Plowd. 309.) The Code Civil of France adopts the same expression:—"L'obligation sans *cause* ou sur une fausse *cause*, ou sur une cause illicite, ne peut avoir aucun effet." But this cause is not necessarily the same as the motive to a contract. J. A. Rogron, on the "Code Civil," well says,—"*La cause* de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure libéralité de la part de l'une des parties: ainsi, lorsque je m'oblige à payer mille francs à *Paul*, pour tels services que son père m'a rendus, la cause déterminante du contrat, ce sont les services qui m'ont été rendus; le *motif* qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son père; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause."

This doctrine is adopted and engrafted upon our law in the recent case of *Thomas v. Thomas*, 2 Q. B. 851, where the distinction between cause and motive is well exemplified; and Lord Denman, C. J., interprets the word *cause*, in the passage referred to, as "one which confers what the law considers a benefit on the party."—Patteson, J., further remarks,—"*Motive* is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events, it must be moving from the plaintiff. Now that which is suggested here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff, it moves from the testator; therefore, legally speaking, it forms no part of the consideration." See also *Lilly v. Hays*, 5 Ad. & Ell. 548.

The consideration must not only move from the plaintiff, but it must be such an one as he has the means of performing legally. 2 Wms. Saund. 137 *h*; and see post, Lect. VI. as to immoral and illegal considerations. Subject to these restrictions, says Selwyn's *Nisi Prius*, "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, with the consent, express or implied, of the defendant, or, in the language of the pleading, *at the special instance and request of the defendant*."—1 Selwyn's *N. P.* "*Assumpsit*," p. 43.

This leads us to another element of contracts, of which it may not be useless to give some account here, inasmuch as it is involved in the subject of this and the following lecture.

Incidental to the relation between the parties to a contract arising from the nature of a consideration is their mutual assent to it.

"A contract," says Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise." Hence is assent or acceptance indispensable to the validity of every contract; for "as I cannot," continues Pothier, "by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right." (See *Grotius*, lib. ii. c. 2.) Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract.

The editors of "*Saunders*" and Mr. Chitty are at issue on this point. Mr. Chitty says that "every agreement ought to be so certain and complete, that *each party may have an action upon it*, in regard to matters to be performed for his benefit by the other contracting party;" and "that if the one party never were bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality." (Chit. Contr. 15.) This is denounced in 2 Wms. Saund. 186 (i), as "stated too broadly, and must be confined, it should seem, to those cases where the want of mutuality would leave one party without a valid consideration for his promise." This suggestion is founded on a remark by Tindal, C. J. in *Arnold v. The Mayor of Poole*, 4 M. & Gr. 896; that case, however, referred to peculiar rights of suit by and against a corporation. It is difficult to conceive a case where there should be a valid consideration on both sides, and yet a want of mutuality. The note goes on to state that "there are many cases of contracts not mutually binding at the time when made; as where A. says to B, 'If you will furnish goods to C. I will guarantee the payment;' there B. is not bound to furnish them; yet if he does, he may sue on the guarantee." (*Morton v. Burn*, 7 Ad. & Ell. 19.

[*90-*91] *be that B. has lent me 50*l.*: here is a consideration by way of advantage to me. It may be *that he has performed or has agreed

23; *Kennaway v. Treleavan*, 5 M. & W. 498. 501.) "So a contract signed by the defendant only, and not by the plaintiff, has been allowed to be enforced by action, notwithstanding the objection of a want of mutuality." (*Laythoarp v. Bryant*, 2 B. N. C. 735.) It is submitted that there was no want of mutuality in these cases. The judgment in *Laythoarp v. Bryant* went entirely on the point that it was not necessary that both parties should sign a note of the contract under the statute of Frauds; it is expressly stated that "the agreement in truth is made before any signature;" and the agreement was mutual. In *Morton v. Burn* it is expressly said in the judgment, "there is sufficient mutuality." *Kennaway v. Treleavan* is one of the many cases of a conditional contract, —of an inchoate guarantee—not binding nor intended to be binding when made, but to take effect subject to a stated contingency: the terms of it were, "I agree to be security for T. C. for whatever, *while he is in your employ*, you may trust him with." It was held in the judgment, that the consideration for the promise was the employment of T. C., and that the guarantee attached as soon as the employment began. If so, the mutuality and implied assent were complete. It is true, however, that no action could have accrued to the guarantor upon this agreement, and therefore is it that the test of mutuality, as laid down by Mr. Chitty, is too large; for there are binding contracts which from their nature neither bind nor admit of any breach by one of the parties, but to which assent is nevertheless a requisite; for in the case just put, had the party who received the guarantee failed to employ T. C. and accept the guarantee, he could not have enforced the promise of the guarantor, and there would have been *no contract*.

It is humbly submitted that the law lies between the two extremes of opinion held by Mr. Chitty on the one side, and the note to "*Saunders*" on the other: and is thus tersely stated by Tindal, C. J., in *Jackson v. Galloway*, 5 B. N. C. 75:—"Every contract consists of a request on one side, and an assent on the other." These are the terms of mutuality: if either are absent, there is no contract.

The request may be either express or implied, and likewise the promise or assent. Both are far oftener implied than expressed in simple contracts. The cases in which the request or the promise are express require little comment. The ordinary meaning of the words used will determine the legal effect, according to the established rules of construction.

The assent to a contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees, subject to some modification or condition, there is no mutuality of contract until there has been an express assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void. See instances of contracts defective on this ground in the cases of *Jordan v. Norton*, 4 M. & W. 155; *Cook v. Oxley*, 3 T. R. 653, where a distinction is taken between a mere proposal and an agreement to sell. (See also *Adams v. Lindsell*, 1 B. & Ald. 681.) The case of *Routledge v. Grant*, 4 Bing. 660, is also a good example of this principle. Grant offered to purchase Routledge's house, requiring possession on the 25th of July, and a definite answer in six weeks; Routledge accepted the offer, with possession on the 1st of August; Grant afterwards, within the six weeks, retracted his offer, and it was held that he had a right to do so.

The party who made the offer has a right to say "*Non in hæc fœdera veni*;" and decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made, and within a specified period—or if none be specified, then within a reasonable time—the contract is binding on both parties. At any time before it is accepted the offer may be rescinded; but not afterwards. A familiar illustration of the doctrine of assent is afforded by the recent letters allotting railway scrip. Many of these letters were in reply to a simple request for shares, and after complying with this request, they went on to stipulate that the *allotment should be void* unless the deposit money were paid at a certain specified place within a specified time. Thus the allottee offered to buy and to pay for his shares; but the allottees added the provision that the shares should be void in default of a mode of payment prescribed by themselves; whereas without such stipulation mere default of payment would not have voided the contract: to this additional stipulation there was often no assent, and the contract was therefore null and void, and no such allottee could have been sued upon the transaction, for the stipulation was clearly not implied in the agreement to take the shares. Pothier says "the allowance of a certain time for paying money due, the liberty of paying it by instalments, &c., and the like, are *accidental to the contract*, because they are not included in it without being particularly expressed." 1 Evans's Pothier, 7. And expressed assent is obviously requisite, for as its subject-matter is not implied in the primary contract, neither is the assent to it.

to perform some laborious service for me; if so, here is a *consideration by way of inconvenience to him, and of advantage to me at the same time. It *may be that he is to labour for a third person at my request: here will be inconvenience to him *without advantage to me; or it may be that he has become surety for some one at my request: *here is a charge imposed upon him. Any of these will be a good consideration to sustain the promise on my part. That this is the true rule of the law of England, you may collect from various instances, among which I will refer you to *Williamson v. Clement*, 1 Taunt. 523; the judgment of the L. C. J. in *Willatts v. Kennedy*, 8 Bing. 8; and the observations of Lord Ellenborough in *Bunn v. Guy*, 4 East, 194. [*92] [*93-94] [*95]

Provided there be some *benefit* to the contractor, or some *loss, trouble, inconvenience, or charge* imposed upon the contractor so as to constitute a *consideration*, the Courts are not willing to enter into the question whether that *consideration be *adequate* in value to the thing which is promised in exchange for it. Very gross inadequacy, indeed, would [*96]

Where a request is not expressed it is often implied from the circumstances of the transaction. Thus, wherever one party derives benefit from a consideration, it is equivalent to and implies a request on his part: the acceptance of goods or money lent, for instance, is an assent from which the law implies a request. Where the consideration is already performed before a promise is given, the previous request becomes of more importance, and must be proved, except where the law implies it from the nature of the contract; but this subject is amply discussed in the next lecture, where the cases are cited. Where there is an actual acceptance of the subject-matter of the contract the assent is complete without proof of the request. There are various ways in which the mutual assent of both parties to a contract may arise by reciprocal request, performance, promise, and acceptance, but the test in all cases seems to be in the first place whether the assent be mutual.

The law implies a promise in like manner with requests where the promise is of the nature of the contract. Thus, where goods are sold it implies a promise to pay for them: where they are lent it implies a promise to take care of and to return them: where hired, to avoid negligence of them, and to pay the hire. Certain promises are implied from the peculiar functions with which a man is invested. An executor, for instance, impliedly promises to pay the expenses of the testator's funeral. The distinction between implied and express promises is seen in such an agreement as waives or modifies the promise which the law would otherwise import into the contract; as for instance, that the borrower shall not be answerable for the loss of the thing borrowed; this is an express promise waiving the implied promise, for *expressum facit cessare tacitum*. Implied promises arise also from custom and from the established and known mode of dealing in vogue between the parties. (See *More v. Houghton*, 1 Stark. 487; *Stewart v. Aberdeen*, 4 M. & W. 211; *Roberts v. Havelock*, 3 B. & Ad. 404.) Assent is sometimes implied from the absence of dissent, where a person knowingly permits services to be rendered for him, or those in whom he is interested, without objecting: in some of these cases the law infers a previous request from the subsequent assent. (See the next Lecture, p. 111.)

Pothier enumerates another class under the title of *quasi contracts*, which he defines as "acts of a person permitted by the law which obliges him in favour of another," *without any agreement intervening between them*;" and one of the instances he gives is that of an heir's acceptance of a succession, which obliges him to the payment of the legacies "without the intervention of any agreement." This seems to be a somewhat doubtful distinction: there is an agreement; namely, the implied one attaching to the acceptance of any station or emolument, to discharge the duties and claims which belong to it. There is doubtless a legal obligation; but there is not less on that account an implied promise to perform it. The cases in which actions for *tort* and *assumpsit* are concurrent remedies involve both legal obligations and implied promises. In these cases, where the default is tortious (as where a man hires a horse, and negligently injures him,) the promise flows from the obligation; in the case of contracts, the obligation flows from the promise. The implied promise, as well as the obligation exist in both cases; and an action lies in both on the *breach of promise*; but it lies for the *breach of obligation* only in the former case; and this appears to be the main practical distinction between them.

be an index of fraud, and might afford evidence of the existence of fraud ; and fraud, as I have already stated to you, is a ground on which the performance of any contract may be resisted. But, if there be no suggestion that the party promising has been defrauded or deceived, the Court will not hold the promise invalid upon the ground of mere *inadequacy* ; for it is obvious that to do so would be to exercise a sort of tyranny over the transactions of parties who have a right to fix their own value upon their own labour and exertions, and would be prevented from doing so were they subject to a legal scrutiny on each occasion on the question whether the bargain had been such as a prudent man would have entered into. Suppose, for instance, I think fit to give 1000*l.* for a picture not worth 50*l.* : it is foolish on my part ; but if the owner do not take me in, no *injury* is done. I *may* have my reasons. Possibly I may think that I am a better judge of painting than my neighbours, and that I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbour from making the best of his property, provided he do not take me in by telling me a false story about it. Accordingly, in the absence of fraud, mere inadequacy of consideration is no ground for [*97] avoiding a *contract. You will see two remarkable instances of this in the late cases of *Bainbridge v. Firmston*, (a) 1 Perr. & Dav. 2, and *Wilkinson v. Olivièra*, 1 Bing. N. C. 490, in which the defendant promised to give the plaintiff 1000*l.* for the use of a letter which contained matters explanatory of a controversy in which he was engaged, and the consideration was held not to be inadequate to support the promise. (b)

There is an old case upon this subject involving so singular a state of facts that I cannot forbear mentioning it. It is called *Thornborow v. Whiteacre*, and is reported 2 Ld. Raym. 1164.

It was an action in which the plaintiff declared that the defendant, in consideration of 2*s.* 6*d.* paid down, and 4*l.* 17*s.* 6*d.* to be paid on the performance of the agreement, promised *to give the plaintiff two grains [*98] of rye corn on Monday the 29th of March, 4 on the next Monday, 8 on the next, 16 on the next, 32 on the next, 64 on the next, 128 on the next, and so on for a year, doubling, on every successive Monday, the quantity delivered on the last Monday.

The defendant demurred to the declaration, and upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters, so that, as Salkeld the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the Court said, that though the contract was a foolish one, it would hold at law, and that the defendant

(a) 10 Ad. & Ell. 309.

(b) The consideration must nevertheless be of some value in contemplation of the law ; for instance, if a man make an estate at will in favour of another, this is an insufficient consideration, for he may immediately determine his will, (1 Roll. Abr. 23, pl. 29 ;) neither is the termination of disputes about debts an adequate consideration, for there may be no debt actually due. (*Edwards v. Baugh*, 11 M. & W. 641.) Mere moral considerations, and cases such as *Harris v. Watson*, already cited, (p. 86,) are also insufficient. (See also *Clutterbuck v. Coffin*, 3 M. & Gr. 842, and *England v. Davidson*, 11 A. & E. 856.) But the consideration need not be *co-extensive* with an *express* promise, as we have seen : (p. 54, n. ante, and *Raikes v. Todd*, 8 Ad. & Ell. 846 :) though where the promise is *implied*, it is *co-extensive* with the consideration from which it flows. *Roscorla v. Thomas*, 3 Q. B. 236, per Lord Denman, C. J., and see post, p. 114, n.

ought to pay something for his folly. The case was ultimately compromised. I presume, however, that if, instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea: since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud, so that the case presents a strong example of [*99] the reluctance of the Courts to enter into a question as to the adequacy of consideration. This reluctance is also very strongly exemplified by some late cases turning on contracts in restraint of trade. By the law of England, a contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration. And it was once laid down that the consideration must be *adequate*, and that the Court would enter into the question of adequacy. However, they have lately decided that they will not do so. These cases are particularly strong, for they are cases in which, contrary to the general rule of law, a consideration is required, even though the contract be by deed. I shall have occasion to mention them again in a subsequent lecture. At present I will only say that the recent decisions to which I refer are, *Hitchcock v. Coker*, 6 Ad. & Ell. 439, (a) *Archer v. Marsh*, 6 A. & E. 966, and *Leighton v. Wales*, 5 M. & W. 551.

I think that I have now sufficiently explained what it is that the law recognises as a consideration sufficient to support a promise without deed. I must not, however, conclude without noticing one class of cases which form a species of exception to the rule that a simple contract requires a consideration to support it. I allude *to the case of a negotiable [*100] security, a bill of exchange or promissory note. These, not being under seal, are simple contracts; but there is this marked distinction between the situation in which they, and that in which any other simple contract stands, namely, that they are always presumed to have been given for a good and sufficient consideration, until the contrary is shown. And even if the contrary be shown, still, if the holder for the time being have given value for the instrument, his right to sue on it cannot be taken away by showing that the person to whom it was originally given could not have sued, unless, indeed, it be further shown that he had *notice* of the circumstances, or that he took the security when overdue, which is a sort of constructive notice, and places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *prima facie* taken to have been given for good consideration, and every indorsement to have been made on good consideration. See the cases collected Byles on Bills, last ed. p. 72.

(a) Confirmed by *Proctor v. Sargent*, 2 M. & Gr. 20, and *Green v. Price*, 13 M. & W. 698, per Parke, P.

[*101]

*LECTURE V.

CONSIDERATION OF SIMPLE CONTRACTS.—EXECUTED CONSIDERATIONS.—
WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL.—MORAL CON-
SIDERATIONS.—ILLEGAL CONTRACTS.—RESTRAINTS OF TRADE.

I ENDEAVOURED to explain in the last lecture what it is that the law of England recognizes as a consideration sufficient to support a promise without deed. I stated that any benefit to the person who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon the person to whom it is made, will satisfy the rule of law in this respect. In order to render this as clear as possible, I am about, before proceeding to the next branch of the subject, to illustrate it by mentioning one or two decided cases, in which certain considerations have been held sufficient to support the promises founded on them.

It has been frequently decided that, if one man have a legal or an equitable right of suit against another, his forbearance to enforce that legal or equitable right of suit, is a sufficient consideration for a promise either by the person liable to him, or any third person, either to satisfy the claim on which that right of suit is founded, or to do some other and collateral act.

[*102] Thus, in the case of *Morton v. Burn*, 7 Ad. & Ell. 19, the *plaintiff, in an action of *assumpsit*, stated in his declaration that he was the assignee of a bond for 728*l.* 2*s.* 6*d.*, in which the defendant was the obligor, and that, in consideration that the plaintiff would receive payment on certain specified days, and forbear proceeding in the meanwhile, the defendant had promised to pay on those days. After a verdict for the plaintiff, it was objected, in arrest of judgment, that there was no consideration for the promise; for that, if an action had been brought in the name of the obligee of the bond, the agreement of the assignee to forbear would have been no defence (upon a ground which I have already sufficiently explained, namely, that an obligation by deed cannot be discharged by an agreement without deed.) The Court, however, decided that the consideration was sufficient; “for,” (said the Lord Chief Justice,) “although the agreement “to forbear would not be pleadable to an action in the name of the obligee, “yet, unless the plaintiff *did* forbear according to his agreement, he would “not be able to sue on the defendant’s promise.” Thus again in *Willatts v. Kennedy*, 8 Bing. 5, the plaintiff, who had been appointed by the Court of Chancery a receiver of the debts and moneys of a firm, agreed to give time of payment to a person who owed money to the firm, in consideration of which a third person promised to guarantee the debt. So, in an action

[*103] against that third person, it was objected *that there was no sufficient consideration for his promise; the Court of Common Pleas, however, decided that there was so. Upon the effect of *forbearance* as a consideration, you may see further *Parker v. Leigh*, 2 Stark. 229, *Atkinson v. Bayntun*, 1 Bing. N. C. 444, and *Smith v. Algar*, 1 B. & Ad. 603, which is an exceedingly strong case. In that case the plaintiff had obtained judgment against Elizabeth Mackenzie for 57*l.* debt, and 65 shillings costs; and in consideration that the plaintiff would forbear to execute a *fieri facias* on her goods, the defendant undertook to pay him 107*l.* in three days. It

was objected that there was no consideration, or, at least, no sufficient consideration; but Lord Tenterden said, "It is true the plaintiff might not perhaps have been entitled to recover to the full extent of 107*l.*, though it is to be observed, he might have levied the costs of the execution in addition to the sum given by the verdict. But he had a right at least to levy 60*l.*, and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum; if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise." (a)

*Again, it has been decided that if I *entrust* a man to do some act for me, although I am to *pay him nothing for per- [*104-*105] forming it, still the mere *trust* which I repose in him is a consideration for a promise on his part to conduct himself faithfully in the performance of it. (See *Whitehead v. Greetham*, 2 Bing. 464, *Shillibeer v. Glynn*, 3 M. & W. 143.) Nay, so far do the cases on this subject go, that it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it, but the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence. This was the point decided in the famous case of *Coggs v. Bernard*, 2 Ld. Raym. 909. And on this point of the law it is that the celebrated distinc-

(a) The forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action. This point has been very recently determined in the case of *Wade v. Simeon*, 15 Law Journ. C. P. 114, where issue had been joined in a previous action for the recovery of a sum of money from the defendant, who had there promised to pay the money and costs, in consideration that the plaintiff would forbear further proceedings. An action having been brought upon this promise, the defendant pleaded that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action. "To that," said Tindal, C. J., in giving judgment, "the plaintiff has demurred, and, doing so, admits the statement contained in it, that he had no cause of action in the original suit, to be true. Having made that admission, it appear to me that he is estopped from saying that there was any valid consideration for the defendant to promise. It is almost *contra bonos mores*, and certainly against all legal principle, that when a man knows that he has no cause for it, he should still persist in prosecuting an action. Then, in order to establish a binding promise, the plaintiff must shew a consideration for it, consisting of something which is either beneficial to the defendant, or detrimental to the plaintiff. It cannot, however, be said that the foregoing of such an action can be regarded by a Court as beneficial to the defendant, because he thereby saves the risk of defeat, and the extra costs which he would necessarily incur in his defence, for we must assume that the result of the action would have been in his favour, and the law would enable him to recover costs, which it regards as a compensation for all the costs the defendant sustains. Neither can the foregoing of the action be regarded as detrimental to the plaintiff, for we can only view it as saving him from the payment of those costs. The consideration, therefore, fails upon both grounds."

On the same principle, the mere fact that disputes and controversies are pending between two persons is no sufficient consideration for a promise to pay money, unless it appear that something was really due, or that the accounts were opened or unsettled, the amount due being alone in doubt, to settle which the promise was given: for the withdrawal of a *bona fide* claim, though unascertained in amount, would be a valid consideration. *Edwards v. Baugh*, 11 M. & W. 641, and *Llewellyn v. Llewellyn*, 14 Law Journ. Q. B. 4, per Coleridge, J. And where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note. *Baker v. Walker*, 14 M. & W. 468.

[*106] tion occurs between remunerated and unremunerated *agents ; from the former, of whom the law implies a promise that they will act with reasonable diligence ; from the latter, only that they will not be guilty of gross negligence. (See *Beauchamp v. Powley*, 1 M. & Rob. 38, *Doorman v. Jenkins*, 2 Ad. & Ell. 256, *Dartnall v. Howard*, 4 B. & C. 345.) And the other equally remarkable distinction, namely, that a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so, whereas an unremunerated agent cannot, although, as we have seen, he *may* be liable for misconduct in the performance of it. (See *Elsee v. Gateward*, 5 T. R. 143.)

Again, if one man is compelled to do that which another man ought to have done, and was compellable to do, that is a sufficient consideration to support a promise by the former to indemnify him. Such is the common case of a surety, who has been compelled to pay a demand made against the principal, and who, as we know, is entitled to bring an action of *assumpsit* to recover an indemnity. (See *Toussaint v. Martinnant*, 2 T. R. 100, *Fisher v. Fellowes*, 5 Esp. 171, and see *Prior v. Hembrow*, 8 Mee. & W. 873, and *Jeffreys v. Gurr*, 2 B. & Ad. 833.)

I might cite a multitude of other cases in which questions have arisen as to the sufficiency of the consideration ; but I think that the instances I have already given are sufficient for the purpose I had in view, which was, to illustrate *the general nature of the questions which arise on the [*107] sufficiency of a *consideration* to support a promise.

There is, however, one thing more to be observed, and that is, that the law recognizes a distinction between what are called *executed* and *executory* considerations. Now with regard to the meaning of these words, which you will continually hear used in legal arguments, it is simply this :—an *executed consideration* is something that has already taken place, an *executory consideration* something that is to take place,—one is *past*, the other *future*. Thus, if A. delivered goods to B. yesterday, and B. makes a promise to-day in consideration of that delivery, this promise is said to be founded upon an *executed* consideration, because the delivery of the goods is past and over. But if it be agreed that A. *shall* deliver goods to B. to-morrow, and that B. shall, in consideration, do something for A., here is an *executory consideration*, because the delivery of the goods has not yet taken place. And so, whenever, at the time of making a promise, the consideration on which it is founded is *past*, the consideration is said to be *executed* ; whenever the consideration is *future*, it is said to be *executory*.

Now, between *executed* and *executory*, or, to speak plain English, between *past* and *future* considerations, the law makes this distinction, namely, that an *executed* consideration must be founded [*108] on a previous request ; an *executory* one need not, for, in fact, its very terms imply a request. For instance, in the case of *Hunt v. Bate*, Dyer, 272, Bate's servant was arrested and sent to prison, and Hunt became bail for him, and procured his liberation, after which the master promised Hunt to save him harmless. Hunt was obliged to pay the servant's debt, and brought an action against Bate upon his promise to indemnify him ; but the Court held that it would not lie. "For," said the Judges, "the master did "never make *request* to the plaintiff to do so much, but he did it of his own "head." But, the report goes on to say, "in another action brought on a

“promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff,” *at the special instance of the defendant*, had taken to wife the cousin of the defendant, that was a “good cause of action, though the marriage was *executed* and *past* before the undertaking and promise, because the marriage ensued at the *request* of the defendant.”

These two cases clearly illustrate the distinction between an *executed*, i. e. *past* consideration *moved*, as we call it, by a previous request, which will support a promise, and an executed consideration not moved by a previous request, which will not support a promise. You will find the same distinction clearly explained in **Lampleigh v. Braithwaite*, Hob. 712, and the judgment in *Eastwood v. Kenyon*, 11 A. & E. 438. [*109]

But here arises another distinction, and it is the last to which I shall refer upon this, I must admit, somewhat complex subject, and which I am therefore desirous of treating in a manner as little complex as possible; but this is a distinction to which it is absolutely necessary to refer, in order that you may not be misled by what I have already stated. There being the rule I have just stated regarding *executed considerations*, namely that an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*, there are certain classes of cases in which this *previous request* is *implied*, and need not be expressly proved by the person to whom the promise is given. Now the cases in which a previous request is implied are as follow:—

First, the case which I have already stated, *in which one man is compelled to do that which another ought to have done, and was compellable to do*. In this case, the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but, though the consideration is *executed*, *the law implies the request*. And therefore in this case an action may be brought for indemnity without proving any express request on the part of the defendant. See **Jeffreys v. Gurr*, 2 B. & Ad. 833, *Pownall v. Ferrand*, 6 B. & C. 439, *Exall v. Partridge*, 8 B. & C. 308, *Grissell v. Robinson*, [3 Bing. N. C. 13.] [*110]

I must further observe upon this class of cases, that not only is the request implied, but the *promise* also; for if, to put an example, A. is indebted to B. in a certain sum of money, and C. is his surety; if C. be compelled to pay, not only is a request by A. to do so implied by law, but a promise by him to indemnify C. is also implied. And, in an action brought by C. to enforce the indemnity, he need prove no express promise, no express request, but simply that A. was indebted to B., and that he, C., as A.'s surety, was compelled to pay that debt. For an example of this you may take the common case of an accommodation acceptor or indorser, who, as soon as he has been obliged to pay the money, may maintain an action against the person for whose accommodation he so indorsed or accepted.

(a) In these cases, “The plaintiff must prove either that the money was paid by *compulsion of law* for the benefit of the defendant, or at his express request; and in order to show payment by compulsion of law, he must shew such a contract as the law will enforce.” *Pawle v. Gurr*, 4 B. N. C. 448, per Tindal, C. J. See also, as to payments of this nature, *Davies v. Humphreys*, 6 M. & W. 153, and *Pitt v. Purssord*, 8 M. & W. 538, which decide that where there are co-sureties, any one who is compelled to pay may bring an action against his co-sureties for contribution, without shewing that he paid by compulsion.

[*111] **Secondly*, where the person who is sought to be charged *adopts*, and *takes advantage of* the *benefit* of the consideration. Suppose for instance, A. purchases goods for B. without his sanction, B. may, if he think fit, repudiate the whole transaction; but if, instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to A. to purchase them, and will also imply a promise by him to repay A., and he will be liable in an action of *assumpsit* for money paid to his use, founded on that implied promise. See 1 Wms. Saund. 264, note 1, where you may, if you please, find a great deal of valuable information on the whole subject of which I am now treating.(a)

[*112] *The *third* case, in which a request is implied, is that in which a person does without compulsion, that which the person sought to be charged was compellable by law to do. Suppose, for instance, A. owe B. 50*l.*, and C. pays it; now here, if A. promise to re-pay C., it will be implied that the payment by C. was made at his request. (See *Wing v. Mill*, 1 B. & A. 104.) But, in this class of cases, you will observe, though the request is implied, where there is a promise, yet the promise must be *express*, for the law will not imply one, as in the two last cases: thus, if A. is B.'s surety, and is forced to pay his debt, the law implies a request to pay it, and a promise to re-pay. If he be not B.'s surety, but pays it of his own accord, the law implies neither promise nor request, for a man cannot make me his debtor by paying money for me against my will. Yet, even in this case, if B. *expressly* promise to repay it, a request by him to pay it is implied, for it is a maxim that *omnis ratihabitio retrotrahitur et mandato equiparatur*.

In the three cases I have just put the law *implies* a request, on the part of the person sought to be charged, to do that which is relied on as the consideration for the promise upon which it is sought to charge him.(b)

(a) The cases where goods have been supplied to children without the knowledge or express request of the father, fall within this rule. Even where the goods supplied are necessities, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise; in such case it is sufficient that the father should have seen them worn by the child without objection. (*Law v. Wilkin*, 6 Ad. & Ell. 718.) The implication arising from acceptances is equally binding on all parties to the contract who have received benefit from the consideration. See *The Fishmongers' Company v. Robertson*, 5 M. & Gr. 192. In that of *Urmston v. Newcomen*, 7 Ad. & Ell. 899, there appears to have been a doubt whether a father could be liable for necessities supplied to his deserted infant child by a third person without his request, no proof of any contract being given, nor any subsequent adoption of it; but this would now be held to amount merely to a moral consideration, "which is nothing." See post, p. 117, note a.

(b) Since this was written the authorities on this point have been reviewed in the case of *Kaye v. Dutton*, 7 M. & Gr. 807, and although the decision there turned upon entire absence of consideration, the remarks in the judgment lead to the conclusion that, wherever the consideration is executed it will support an express subsequent promise, only where the law itself implies no other promise, and where there has also been an express previous request: but that where the law implies a promise from the consideration, no express promise, differing from that implied by law, can be enforced. In *Kaye v. Dutton*, Tindal, C. J. said, "Two objections were made to the declaration—first, that it did not show any consideration for the promise by the defendant;—secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration, and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. "The cases cited by the defendant, viz. *Brown v. Crump*, 6 Taunt. 300; *Granger v. Collins*, 6 M. & W. 458; *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M.

*There is a fourth class of cases in which the consideration relied on has been that one man has done *for another some-[*113-*114]

& W. 790, and *Roseorla v. Thomas*, 3 Q. B. 234, certainly support that proposition to this extent,—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum* there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, AT HIS REQUEST, under circumstances which would not raise any implied promise. In such case it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate*, Dyer, 272, and several cases mentioned in the margin of the report of that case, seem to go to that extent, as also do some others collected in Roll. Abr. Action sur Case."

In *Hopkins* and wife v. *Logan*, the declaration stated that after the intermarriage of the plaintiffs, to wit, on the 1st of October, 1833, an account was stated between the husband on behalf of himself, and wife of the one part, and the defendant of the other part, concerning moneys lent by the wife to the defendant, and remaining unpaid before and after the time of the intermarriage. Upon the account so stated the defendant was found indebted to the plaintiffs in a large sum of money; and in consideration of the premises promised to pay the same on the 1st of October then next ensuing. Thus the express promise was to pay money previously lent by the plaintiff's wife to the defendant on a certain day, whereas the promise implied by law arising upon an account stated between the parties, was to pay on request, and it was held that any other promise was *nudum pactum*.

Roseorla v. Thomas was an action for breach of warranty of a horse. The declaration alleged that, in consideration that the plaintiff, at the request of the defendant, had bought of him a horse for 30*l.*, the defendant promised that he was sound and free from vice. It was objected, in arrest of judgment, that the executed consideration would not support the subsequent express promise that the horse was sound. The Court held, after *Cur. Adv. Vult*, that "the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

"The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall v. Adney*, 3 Bos. & Pul. 249, and in the case of *Eastwood v. Kenyon*, 11 Ad. & Ell. 438. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law."

Here it will be seen that no promise was implied by law, but neither was there any previous express request: this decision therefore strongly supports the position that an express promise alone will not suffice, even where the law implies no promise. In *Hopkins v. Logan* there was a promise implied by law.

Express request appears to be unnecessary where the promise is implied by law. In *Victors v. Davies*, 12 M. & W. 758, the Court of Exchequer held, as we have seen, that it was not necessary to aver a previous request to support a count for money lent. Mr. Baron Parke very strongly marks the distinction between the cases where the law implies a promise, and where it does not imply it, as determining the necessity of a previous request. "There cannot," he says, "be a claim for money lent unless there be a loan, and a loan implies an obligation to pay. If the money is accepted, it is immaterial whether or not it is asked for. The same doctrine will not apply to money paid, because no man can be a debtor for money paid unless it was paid at his request. What my brother Manning says, in the note to which I have referred, is perfectly correct. In this masterly comment by Serjt. Manning, which will be found in 1 M. & Gr. 265, n. a., he confutes the contrary doctrine put forth by Mr. Serjt. Williams, in his note to the case of *Osborne v. Rogers*, 1 Saund. 264, n. 1. Serjeant Manning says:—"Even where the con-

thing which that other, though not *legally*, is morally bound to do. In [*115-*116] such cases it is clear, that if there be no *express* promise to remunerate him, remuneration cannot *be enforced. But it has been made a great question, and has been frequently discussed whether, [*117] even if there be an express promise, any request can be implied in order to support the consideration. On this question, which is but a branch of one which has been often the subject of anxious consideration, namely, in what cases a moral obligation is a sufficient consideration to support a promise, you may see *Lee v. Muggeridge*, 5 Taunt. 36, *Atkins v. Banwell*, 2 East, 505, the note to *Wennall v. Adney*, 2 B. & P. 250, *Eastwood v. Kenyon*, 11 A. & E. 438.(a)

sideration is entirely past, it appears to be unnecessary to allege a request of the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*."

Express requests are therefore of limited avail; for it is thus settled, by the concurrent judgment of the three Courts, that where the promise made differs from that implied by law, such express promise cannot be enforced, and express promises are therefore nugatory in such cases, whether there be an express request or not. In *Hopkins v. Logan* the law would, according to the doctrine in *Victors v. Davies* have implied the request, had the promise itself been that which the law implied; and Mr. Justice (then Baron) Maule went further, and laid down the rule of law too broadly to admit of any qualification in the case of an express request:—"An executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two coexisting promises on one consideration." It would appear that the maxims, "*Expressum facit cessare tacitum*," as well as "*omnis ratihabitio retrotrahitur et mandato equi paratur*," do not apply where it is sought to uphold a past consideration by any different promise than that implied by law.

Where no promise is implied by law from the executed consideration, it is certainly deducible, no less from old law than from the recent judgment in the Common Pleas, that an express promise may be enforced, *provided the consideration were moved by a previous express request*. *Hunt v. Bate* (see ante) implies that a request would have sufficed; and in *Lamplough v. Braithwaite* it is laid down, in express terms, that "if a voluntary courtesy be moved by a suit on request of the party that gives the *assumpsit*, it will bind: for the promise that follows is not naked, but couples itself with the suit before and the merits procured by that suit."

It follows, from the foregoing cases, that where the consideration is executed, an express promise without an express previous request is in no case of avail;—and where it is preceded by an express request,—then only where the law implies no other promise.

(a) The recent cases leave no doubt on the subject. There being no promise implied, by law, the rule laid down in the last note does not determine this question; but the law of moral obligation does, which is concisely stated by Mr. Baron Parke in *Jennings v. Brown*, 9 M. & W. 501:—"A mere moral consideration, *which is nothing*:" and Tindal, C. J., in *Kaye v. Dutton*, says, "A subsequent express promise will not convert into a debt that which of itself is not a legal debt." If more authority be required on the point, it will be found in the judgment to which Mr. Smith refers in *Eastwood v. Kenyon*, where the conclusion deduced from the cases in the note to *Wednall v. Adney*, 3 Bos. & Pul. 247, is upheld, and is as follows:—"An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." Lord Denman, C. J., thus explains in *Eastwood v. Kenyon*, the broad principle upon which this doctrine is upheld in one of those great judgments which characterise our courts of common law:—"The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts: suits would thereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

In *Monckman v. Shepherdson*, 11 Ad. & Ell. 415, the same doctrine was applied, and it was there held that even where a good consideration had existed and had been forfeited

*I shall say no more upon the subject of *executed* and *executory* considerations, a subject upon which I almost regret having entered; for the distinctions on which I have been forced to touch are so nice, and so hard to be conveyed in the rapid and cursory suggestion of a lecture, that I fear there may be some among my audience to *whom I may not have succeeded in rendering all that I have said upon that part of the subject intelligible. I should have left the subject incomplete had I not touched upon them, and that was the reason which induced me to do so. I have now said what I intended to say with regard to the sufficiency of the consideration, and the result may be thus summed up. [*118] [*119]

Any advantage to the person promising, or damage, inconvenience, liability, or charge to the person to whom the promise is made, constitutes a sufficient consideration to uphold a promise; but, if that consideration be executed, that is, if, at the time of making the promise, that which is to be the consideration for it has already taken place, in such case there must have been a *request* by the person promising, in order to render such a consideration sufficient. If an *express request* can be shewn, there can be no difficulty; but, if not, the law will imply one in certain cases, and those cases are,

- 1st. Where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do.
- 2ndly. Where the consideration consists in something the benefit of which the person promising has accepted and enjoyed.
- 3rdly. Where the consideration consists in the person to whom the promise is made having **voluntarily* done that which the person promising ought to have done, and was compellable to do, (and in this third case the promise must be an *express* one, whereas in the two former, the law implies *it* as well as the request.) *Lastly*, the case which, as I have said, is even now doubtful, and which depends on the question whether the voluntary performance of that to which a man was morally though not legally obliged, be of itself sufficient to support an *express* promise by him to remunerate the party performing it."(a) [*120]

Proceeding in the order in which I stated to you that it was my intention to proceed, the next subject at which we arrive is the effect of *illegality* upon the contract. And, upon this subject, I have already said generally, that every contract, be it by deed or be it without deed, is void if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration. *Ex turpi causâ non oritur actio* is the maxim of ours, as well as of the civil law.(b) *A deed, for the purpose of charging the maker, requires as we have seen, no consideration at all to sup- [*121]

it could not be revived by a parol promise founded on a moral obligation. See also *Beaumont v. Reeve*, 15 Law Journ. Q. B. 141, where these cases are cited as settled law; and the decision in *Lee v. Muggeridge*, 5 Taunt. 36, must be considered as overruled. (See post, p. 122, note a.)

(a) See antè, p. 117, n. a.

(b) It is immaterial whether the illegality be part of or only introductory to the cause of action; if the plaintiff requires any aid from an illegal transaction to make out his case, he cannot maintain it. (*Simpson v. Bloss*, 7 Taunt. 246.) This rule was upheld in the very recent case of *Fivaz v. Nicholls*, 15 Law Journ., 125, C. P., where the plaintiff

port it; but an illegal consideration is worse than none, and if it be founded upon such a one, it will be void, nor will the rules relating to estoppel prevent the party from setting that defence up. A simple contract *requires*, as we have seen, a consideration to support it. If the consideration be illegal, it is *à fortiori* void, nor will rules which I endeavoured to explain regarding the admissibility of parol evidence to contradict a writing prevent that defence from being set up where the illegality does not appear on the face of the instrument, any more than the doctrine of estoppel will avail to prevent inquiry into the true consideration for a deed. Parties cannot deceive the law by the form of their contracts; and, as an illegality in the consideration is fatal, so, and upon the very *same grounds*, is one in the *promise*. "*You shall not*," says the L. C. J. in *Collins v. Blantern*, "stipulate for iniquity."

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders the contract valid quoad the legal acts; but if any

[*122] ^{*}part of the consideration be illegal, the whole contract fails. Now illegality is of two sorts: it exists *at common law*, or is created *by some statute*.

A contract illegal at common law is so on one of three grounds: either *because it violates morality*; or *because it is opposed to public policy*; or *because it is tainted with fraud*.

Of the first class, those namely which are void because they violate the principles of morality, you will find an example in the case of *Fores v. Johnes*, 4 Esp. 97, in which Mr. Justice Lawrence held, that a printseller could not recover the price of libellous publications which he had sold and delivered to the defendant. "For prints," said his lordship, "whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral, nor for such as are libels on individuals, and for which the plaintiff might be rendered criminally answerable for a libel." (a)

brought an action on the case against the defendant for having corruptly conspired to cheat the plaintiff and deprive him of his costs in a previous action on a bill of exchange, in which the plaintiff obtained judgment on the ground that it was given for an illegal consideration; but it having appeared that the bill had been originally indorsed by the plaintiff to the defendant to compromise a felony, this illegality being the foundation of the subsequent action was held to invalidate it.

(a) The great majority of cases tainted with immorality arise from prostitution. And we have seen, that any contract of which the object is the continuance of an immoral connection is void, and this has been extended to actions for the recovery of rent for lodgings used by a prostitute, where the landlord was cognizant of the purpose to which they were put. (*Giraldy v. Richardson*, 1 Esp. R. 13; *Jennings v. Throgmorton*, R. & M. 251.) The distinction must be noted between the cases in which the consideration is immoral and where there is none: a contract by deed is void not because it is immoral, but because there is no consideration at all. An instance of this occurred in the case of *Binnington v. Wallis*, 4 B. & Ald. 650, where it was held that past cohabitation alone or ceasing to cohabit in future will not suffice; and in *Eastwood v. Kenyon*, *suprà*, the doctrine in *Adney*, *suprà*, has been applied to these cases, namely, that, "an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise." Now a moral obligation is not a good consideration, but, according to Parke, B. in *Jennings v. Brown*, *suprà*, "is nothing." Consistently with this doctrine it was held, in the recent case of *Beaumont v. Reeve*, *suprà*, that even past seduction was no consideration for a promise to pay an annuity. Where, however, some executory consideration not immoral, enters into the contract it is main-

*Next, with regard to the second class, (a) those namely which are void as contravening public *policy; and it might perhaps [*123-*124] have been more simple to have ranked this and the former as one and *the same class, since it is obvious that wherever a contract has an [*125] immoral tendency there it is opposed to the public policy, and the only reason for dividing them into two classes is, that there are some contracts which involve no offence against the laws of morality, and nevertheless are opposed to public policy; such, for instance, are contracts in *general restraint of trade*.

There seems to be nothing obviously immoral in a man's promising or

tainable, and this forms the ground on which the case of *Gibson v. Dickie*, 3 M. & S. 463, is distinguishable from those just cited. There the consideration was that the woman should continue single, and not cohabit with D. G. or any one else. It is, however, a question whether such a contract might not be held void, as being in restraint of marriage. Agreements to pay money in support of a bastard child, the result of cohabitation, are on the same principle held good, as there is a liability on the father to do so: *Jennings v. Brown*, *supra*.

The rule to be deduced from the cases is, that simple contracts are void where the consideration is either merely moral or immoral; but that bonds are void only where the consideration is immoral, as in all cases where it appears that future cohabitation is contemplated. See *Smyth v. Griffin*, 14 Law Journ., L. C. 28.

(a) Instances abound in the books of cases where contracts have been thus avoided, as where public offices are obtained on private understanding injurious to the purity of the public service. (*Garforth v. Fearon*, 1 H. Bl. 327; *Blachford v. Preston*, 8 T. R. 89.) All acts whereby favouritism is purchased at the sacrifice of any public trust or interest, such as contracts with particular creditors against the policy of the bankrupt laws (*Nerot v. Wallace*, 3 T. R. 17; *Davis v. Holding*, 1 M. & W. 159; and *Staines v. Wainright*, 6 B. N. C. 174,) or of purity of election. See *Coppock v. Bower*, 4 M. & W. 361, where a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement in consideration of a sum of money, and upon other terms, to proceed no further with the petition, it was held that this agreement was illegal. So are all contracts which affect the rights of the revenue; for instance, all such as relate to smuggling, though the plaintiff merely aided in the act, are void. (*Lordson v. Temple*, 5 Taunt. 181.) The mere sale of goods, however, by a person who takes no part in their illegal use afterwards, though he knows of it, has been held to be a valid contract. (*Holman v. Johnson*, 1 Cowp. 341.) And it may be taken as a general rule applicable to all cases of illegality of contract, that where it is legal at the time it is made, the prior or subsequent illegality of transactions relating to it, but *not entering into the contract in question, or essential to it*, does not invalidate it. (*McCallan v. Mortimer*, 9 M. & W. 643.) All contracts tending to any breach of the peace are void. It would be easy to multiply cases on this kind of illegality, but it is apprehended that the explanation of the law in relation to it would be nowise assisted by citing them.

There is one illegality requiring notice—maintenance, or the illegal abetting of suits by parties not concerned in them, or to use the broad language of Coke, "When one maintaineth the one side without having any part of the thing in the plea or suit." (Co. Litt. 38 b.) But the ancient doctrine has been somewhat narrowed by more modern judgments; (see *Master v. Miller*, 4 T. R. 340, per Wilmot, J.:) and it is now requisite, in order to constitute maintenance, that a man should neither have nor believe he has any interest in the suit he abets, either individually or collectively with others. In this case only is he guilty of maintenance. But where landlords, for instance, have joined together in protecting their reversionary interest, supposing that all their tenants would be included in proceedings taken against some of them to extinguish a modus, and thereupon united in defending a suit brought against the tenants, this was held recently not to be maintenance. (*Findon v. Parker*, 11 M. & W. 675.) In that case Lord Abinger, C. J., said, "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make." In such cases no contract arising out of the bringing or conducting such action is legal.

ChamPERTY is an agreement to share the fruits of maintenance, and equally void. See *Stanley v. Jones*, 7 Bing. 369, per Tindal, C. J.; and *Stevens v. Bagwell*, 15 Ves. jun. 139.

[*126] covenanting not to carry *on his trade within the limits of England. Nevertheless, such a covenant or promise is totally void. This was decided so long ago as in the reign of Henry V. in the year-book of the 2d year of which reign, fol. 5, a bond restraining a weaver from exercising his trade was held void: and Judge Hall flew into such a passion, at the sight of it, that he swore on the bench, and threatened to send the obligee to prison till he had paid a fine to the king; upon which Lord Macclesfield observes, in *Mitchell v. Reynolds*, 1 P. Wm. 181, "that he could not but approve of "the indignation the judge expressed, though not of his manner of expressing it." Accordingly, such contracts have ever since been held void.

"The law," said Mr. J. Best, in *Horner v. Ashford*, 3 Bingh. 328, "will not allow or permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom would be void."

But here arises a distinction, which was first established by Lord Macclesfield, in the celebrated case of *Mitchell v. Reynolds*, 1 P. Wm. 181, and which has ever since been upheld. It is, that, though a contract in general restraint of trade is void, one in partial restraint of trade may be upheld; provided the restraint be reasonable, and provided the contract be founded upon a consideration. "It may often happen," *continued [*127] Lord Wynford, then Mr. J. Best, at the place which I have just cited, "that individual interest and general convenience render engagements "not to carry on trade, or act in a profession, at a particular place [*128] proper." (a) Such restraints were upheld in **Chesman v. Nainby*, 2 Str. 739, which was carried to the Lords, and is reported in 3 Bro. P. C. 349, in *Davis v. Mason*, 5 T. R. 118; in *Proctor v. Sargent*, 2 M. & Gr. 31; and in *Bunn v. Guy*, 4 East, 190, where an attorney bound himself not to practice in London, or one hundred and fifty miles from thence. And, indeed, nothing, as you must be well aware, can be more common upon a dissolution of partnership, than for the retiring partner to covenant that he will not set up the same trade within a certain distance to the injury of the continuing

(a) This judgment is cited in that of the subsequent case of *Mallan v. May*, 11 M. & W. 653, where the principle on which partial restraints of trade are held legal, is thus enlarged on by the Court of Exchequer:—

"Contracts for the partial restraint of trade are upheld not because they are advantageous to the individual to whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry. (*Prugnell v. Grosse*, Alleyn, 67; *Broad v. Joliffe*, Cro. Jac. 596; *Jelliott v. Broad*, Noy, 98.) And such is the class of cases, of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. (*Chesman v. Nainby*.) In such a case the public derives an advantage from the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

partner. But these restraints must, in order to be upheld, be *reasonable*: that is, a greater restriction must not be wantonly imposed than can be necessary for the protection intended; (see *Ward v. Byrne*, 5 M. & W. 548; and the judgment in *Horner v. Graves*, 7 Bingh. 743;) and such a contract, to be good, must be founded on a consideration, even although it be made by deed; see *Hutton v. Parker*, 7 Dowl. 439.(a) It was at one time *thought that the Court would enter into the question of the adequacy of this consideration, *and would hold the contract [*129-*130] void if the consideration were inadequate. However, it has lately been decided in the Exchequer chamber, after great consideration, that the question of adequacy or inadequacy cannot be entertained, but that the parties must judge of that for themselves; *Archer v. Marsh*, 6 A. & E. 966; *Hitchcock v. Coker*, 6 A. & E. 439; which cases you may perhaps remember my citing on the last evening as strong instances of the unwillingness of the Courts to enter into the question of the *inadequacy of consideration* at all.(b)

Another example of contracts illegal because in contravention of public

(a) A liberal discretion is necessarily left to the courts to determine what is or is not a reasonable restraint: it is purely a question of law, and not for the jury. (*Mallam v. May*.) In *Proctor v. Sargent*, supra, *Tindal, C. J.*, thus upholds the rule laid down in *Hitchcock v. Coker*, "I think the rule is properly laid down in *Hitchcock v. Coker*, where it is said that, 'where the restraint of a party from carrying on a trade is larger and wider than the protection of the person with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void.' Although a contract restraining a party from carrying on the business of a dentist within 100 miles round York was decided to be unreasonable in *Horner v. Graves*, it does not follow that we are to hold in this case that a radius of five miles is also unreasonable. This must depend upon the population, the nature of the business, and how far it is ramified in that radius, and upon other circumstances of which we are not bound to take notice. Also I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for although I admit that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good; yet where the question is, whether the restraint is unreasonable or not in point of space, that which would be unreasonable, were it to continue for any length of time, may not be so when it is to last only for a day or two." In *Horner v. Graves*, *Tindal, C. J.*, laid it down as the best test that "Whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void, as being injurious to the interests of the public." The Court of Exchequer, in the judgment in the case of *Mallam v. May*, cite the rule, and thus review the cases:—

"Applying this rule and referring to the analogous authorities, it appears to us that for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason*, 5 T. R. 118, Thetford, and ten miles round, in *Hayward v. Young*, 2 Chitty, 407, twenty miles round a place, was held a reasonable limit in the case of a surgeon; in that of an attorney, London, and 150 miles round, in *Bunn v. Guy*, 4 East, 190; and in *Proctor v. Sargent*, 2 Man. & Gr. 20; 2 Scott, N. R. 289, five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference, in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question."

This clearly develops the principle which the Courts will apply to each case according to its facts. *Rannie v. Irvine*, 8 Scott, 674, and *Green v. Price*, 13 M. & W. 695, proceeded on the same principle; the former deciding that an agreement not to supply the same customers, as the master, was valid; and the latter, that an unreasonable restraint as to limit did not vitiate another reasonable restraint contained in the same bond.

(b) See ante, p. 95, et seq.

[*131] policy, is afforded by those cases in which contracts in general *restraint of marriage have been held void. Thus, in *Lowe v. Peers*, 4 Burr. 2225, a defendant entered into the following covenant :—

“ I do hereby promise Mrs. Catharine Lowe that I will not marry any person besides herself. If I do, I agree to pay her 1000*l.* within three months after I shall marry any body else.” The Court of Queen’s Bench held this contract void, remarking, “ that it was not a promise to marry her, but not to marry any one else, and yet she was under no obligation to marry him.”

This case was affirmed in error ; see *Wilm.* 364. So where a lady gave a bond conditioned not to marry, the Court of Chancery ordered it to be delivered up ; *Baker v. White*, 2 Vern. 215.

On the subject of marriage I may further mention, that a deed tending to the *future* separation of husband and wife is *void* on grounds of public policy. *Hindley v. Marquis of Westmeath*, 6 B. & C. 200, although a deed providing a fund for her support on the occasion of an *immediate* separation is not so ; *Jee v. Thurlow*, 2 B. & C. 547. The distinction between the two cases is obvious. The deed, in the former case, contemplates and facilitates that which the law considers an evil, namely the separation of husband and wife ; in the latter case, the evil is inevitable, and the effect of the deed is but to save the wife from destitution.

Almost the converse of these cases of deeds of separation are what are called

Marriage brokerage contracts, that is, where a man has agreed, in consideration of money, to *bring about a marriage. These are all void [*132] as against public policy, the law considering that unions so brought about are unlikely to be happy ones. This class of cases is founded upon *Hall v. Potter*, 3 Levinz, 411, in which Thomas Thinne gave an obligation of 1000*l.* to Mrs. Potter, conditioned to pay her 500*l.* within three months after he should be married to Lady Oyle, “ a widow,” the reporter says, “ of great fortune and honour, for she was the daughter and heir of Jocelyn “ Percy, Earl of Northumberland.” The Master of the Rolls decreed this bond to be void ; the Lord Keeper reversed the decree ; whereupon there was an appeal to the House of Peers, and, upon hearing the cause there, all the Lords but three or four were of opinion that all such contracts are of dangerous consequences, and ought not to be allowed ; and they reversed the decree of dismissal made by the Lord Keeper, and decreed the obligation to be void.

Another, and an extensive class of cases is that in which the contract has a tendency to obstruct the course of public justice. The time, however, will not permit me to enter upon that this evening.

*LECTURE VI.

[*133]

ILLEGAL CONTRACTS.—FRAUD.—USURY.—GAMING AND HORSE RACING.—
WAGERS.

As a considerable time has intervened since the last lecture, and as it is quite necessary in order to the thorough understanding of a subject, particularly so complex a one as the present, to bear the arrangement of its parts clearly in mind, I shall commence this lecture by re-capitulating the topics which I have already discussed, and pointing out how much of the subject remains to be considered.

I stated in the first lecture the general division of Contracts into Contracts of Record by specialty and Simple Contracts. I then enumerated the differences by which these classes of contract are distinguished from one another, and the peculiarities of each of them; I then touched on the practical distinction which exists between a simple contract by mere words and one reduced to writing, and the further distinction between those cases in which the adoption of a writing is optional, and those in which its adoption is rendered necessary by the provisions of some Act of Parliament, and particularly of the statute of Frauds, in the cases to which it applies. [*134] I then proceeded to explain the nature of the consideration which the law requires in order to support a simple contract, and to touch on the distinction which exists between executed and executory considerations. Then, leaving the separate consideration of simple contracts, and turning to those points which apply to all contracts whatever, I arrived, in the last lecture, at the effect of *illegality* upon the contract. I pointed out the principle upon which illegality tainting either the consideration or the promise is held to vitiate every description of contract, and I then stated to you the subdivision of illegal contracts into two classes; 1st, those which are so at common law; 2dly, those which are rendered so by the provision of some statute. With regard to the former of these two classes, namely, contracts illegal at common law, I explained that a contract *illegal* at common law is so on one of three grounds; 1st, that it violates the rules of morality; 2dly, that it is opposed to public policy; or, 3dly, that it is tainted by fraud.

I exemplified the first of these three classes by the case of *Fores v. Jones*, 4 Esp., in which the print-seller was not permitted to recover on a contract for the sale of libellous publications; and I adduced several instances of the second class of contracts illegal at common law, those which are so because opposed to public policy, in cases, namely, where the contract is in general *restraint of trade, or creates a restraint of trade which, though not general, is unreasonable in its extent, as being larger than the protection of the person who imposes it requires. [*135] Contracts in general restraint of marriage, contracts tending to facilitate the *future separation* of husband and wife, and contracts to bring about marriage for a reward, or as they are called, for *Brocade of Marriage*. There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law, which it will be right to specify before proceeding to the next branch of the subject. It consists of contracts, void, because having a

tendency to obstruct the administration of justice. Such was the very contract in *Collins v. Blantern*, 2 Wels. 341; the case which first established that the person who has executed a deed is not estopped from showing, by way of defence, that it was so executed for an illegal consideration, although he would have been allowed to defend himself on the ground that there was no consideration for it at all. In that case, five persons were indicted for perjury, and it was agreed that Collins, who was their friend, should buy off the prosecutor's evidence by giving him a note for 350*l.*, in consideration of which he undertook not to appear at the Assizes. And it was further agreed that, in order to indemnify Collins against the consequences of his being *called upon to pay the note, Blantern should give Collins his [*136] bond conditioned for the payment of 350*l.*, the same sum for which the note was made. In an action brought upon the bond the Court of Common Pleas held that it was void, and that a plea showing the consideration on which it was given was a good answer to the action.^(a) There is a late case of *Unwin v. Leader*, 1 M. & Gr. 747, which involves the same principle. So does the case of *Coppock v. Bower*, 4 M. & W. 361, in which an agreement to withdraw an election petition in consideration of a [*137] sum of money was held void. So does **Arkwright v. Cantrell*, 7 A. & E. 565, where the grant of a judicial office to a person interested in the matters which would become the subjects of adjudication was held void.

The instances which I have mentioned, are those in which illegality at common law is most frequently set up for the purpose of invalidating a contract. To these must be added the third class of cases which I specified; those, namely, in which the contract is avoided on the ground of fraud; that is, deceit practised upon the contracting party in order to induce him to enter into it. This is so very well known a point, and one of such continual recurrence in practice, that it is useless to multiply examples of its application.^(b) As to the *mode* in which *the defence of fraud is [*138] set up, and rebutted in a court of law, you may refer to Edwards

(a) Agreements to indemnify persons against the consequences of illegal acts falls within this category. (*Shackel v. Rosier*, 2 Bing. N. C. 634.) So also do all promises which are made to obtain release from duress of person on illegal arrest, or under compulsion of colourable legal process, whereby it is made the instrument of oppression or extortion, but not where the arrest was legal. (*Smith v. Monteith*, 13 M. & W. 427; see also *The Duke de Cadaval v. Collins*, 4 Ad. & Ell. 858; *Gas Light Company v. Turner*, 5 Bing. N. C. 675; and *Skeate v. Beale*, 11 Ad. & Ell. 983.) Agreements in consideration of compounding any criminal proceedings, are void; but when they relate to offences which may be made the subject of an action as well as an indictment, agreements to pay the costs of the action on its being stopped, are valid; and also in cases of misdemeanors not of a public nature, such as assaults, &c., a defendant is permitted "to speak with the prosecutor," i. e. compound the offence, after conviction and before judgment, with the sanction of the Court. (See 1 Greaves, *Russell on Crimes*, 132; see also *Beeley v. Wingfield*, 11 East, 46; and *Baker v. Townshend*, 7 Taunt. 422.)

(b) Since these Lectures were written, cases have occurred which give increased importance to the subject of frauds as applied to contracts. Dormant discrepancies of judicial opinion have been revived, and the law, as laid down in recent judgments, invites inquiry into the authority and principle on which it rests. Fraud consists either in the wilful misrepresentation or concealment of some material fact, by which the party defrauded was naturally misled: the question of whether the fact be or not material, is for the jury. (*Lindenau v. Desborough*, 8 B. & Cr. 586.) A mere lie is not always legally a fraud, for if the party defrauded might, by the exercise of ordinary prudence, have detected it, it would not naturally mislead him, and he is remediless, on the principle of *Vigilantibus non dormientibus succurrent jura*. In contracts of sale these lies are of con-

v. *Brown, 1 C. & J. 307; Gale v. Williamson, 8 M. & W. 405. [*139]

stant occurrence, the seller extolling and the buyer depreciating the article to be sold; these assertions, however, are not calculated to prevent either party from the exercise of such caution as would render them harmless; and where they do not enter into the contract itself, they do not amount to *fraud*, however *false* they may be. A distinction was taken in very old cases between fraud and falsehood, which is useful in determining doubtful cases, namely, between statement of facts which are peculiarly within the knowledge of the party making them, and such as are equally ascertainable by either party. In *Leakins v. Clissel, Siderfin*, 146, (temp. 15 Car. II.), we find this distinction drawn between the statement that houses are *worth* so much, and that they *let* for so much, the one being matter of *opinion*, the other of *fact*. (See also 1 Rolle's Abr. 91.) In *Risney v. Selby*, 1 Salk. 211, (temp. 3 Ann.), under similar circumstances it was contended that the "plaintiff was over credulous in taking the defendant's word for it, but the plaintiff had his judgment; for the value of the rent is matter that lies in the *private knowledge* of the landlord and his tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it." (See also *Bailey v. Merrell*, 3 Bulstr. 94; *Pilmore v. Hood*, 5 Bing. N. C. 97.)

Another very important point in the requirements of fraud is the vexed question whether there can be legal fraud without moral fraud; whether the fraud must have been intentional in order to give a remedy to the party thereby defrauded? And the question has commonly turned upon the fact whether the person making the statement did or did not know of its falsehood; in other words, whether, in order to maintain an action for the misrepresentation or fraud, it be necessary to aver and prove the scienter. Of course, the question alone applies to cases where the representation is *not* embodied in the contract, as in cases of warranty; where the party guarantees for the truth of his statement; in which case his knowledge of its falsehood is perfectly immaterial, as he expressly guarantees its truth; and the gravamen is the breach of warranty, and not the deceit. (See *Budd v. Fairmanor*, 8 Bing. 52, per Tindal, C. J.; and *Williamson v. Alison*, 2 East, 446.) The question arises in all cases of implied but not of express warranties. It is nowise affected by the fact that the misrepresentation was made by an agent or third party instead of the principal, the right to bring the action, whether against the agent or the principal, for the misrepresentation, depends on precisely the same principles (see *Ormrod v. Huth*, 14 M. & W. 662, per Tindal, C. J.) and involves the same question, whether the scienter is essential or not. The question also equally arises in respect of what is necessary to support actions in tort, for the misrepresentation, and in respect of what is necessary to support the plea of fraud in defences to actions of debt or assumpsit.

So wide is the range of cases, therefore, which involves this point, and so materially does it affect commercial interests, that it is requisite that the subject be noticed, and the leading authorities in conflict upon it cited here, especially with reference to recent decisions in the Exchequer Chamber.

There is no question that at first moral fraud was essential to the original writ of "disceit;" it, in fact, contained the words "*fraudulente et maliciose*." (Fitz. Nat. Brev. p. 95, ed. 1635; see also *Dyall's Case*, Cro. Eliz. 44.) The earliest doubt on record appears to have occurred in the case of *Chandelor v. Lopus, Croke Jac.* 4. The defendant sold to the plaintiff a stone, which he affirmed to be a bezoar stone, when it was not; and it was held that the bare affirmation that it was a bezoar stone, without warranting it to be so, was no cause of action. It is also there said, that "although he knew it to be no bezoar stone, it is not material;" and *Anderson J.*, held that the mere selling of the stone as a bezoar stone without warranty was actionable. Buller's "*Nisi Prius*" expressly maintains the necessity of the scienter, (p. 30, 1st. edit.) In 1778 we find *Ld. Mansfield, C. J.*, holding another doctrine. In the case of *Pawson v. Watson, Cowp.* 785, which was an action against the underwriters on a policy of assurance alleged to have been made on a false verbal representation, "If in a life policy," said *Ld. Mansfield*, "a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy; because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, 'the man is in good health,' when in fact he knows him to be ill, it is false. So it is if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true." It is however to be observed, that *Lord Mansfield* refers to such misstatements as affect the interest of the party making them.

This intimation of the immateriality of the scienter is at variance with the dicta of two of the judges in the subsequent case of *Pasley v. Freeman*, 3 T. R. 51, where Mr. Justice Buller says, "The fraud is that the defendant procured the plaintiffs to sell goods on credit

[*140--*141] *We next come to that class of contracts which are void because infected with illegality, existing *not by the rules of Common Law, but under the express provisions of some statute.

to one whom they would not otherwise have trusted, by asserting that which he knew to be false ;" and Ashurst J., says, "the *quo animo* is a great part of the gist of the action." The case itself, however, merely decided that it is not necessary to an action on the case for a deceit, that the person making the false statement should derive benefit from it, or that he should collude with the person who is benefitted : and this had been held before.

Haycraft v. Creasy, 2 East, 92 (A. D. 1801,) was the first case in which the question directly arose whether the knowledge of the fraud by the defendant was essential to an action for a false statement of the credit of a third party. Lawrence J., held that, "in order to support the action, the representation must be made *malo animo*, and that there must be something more than misapprehension" or mistake. Leblanc, J., said, "By fraud I understand an intention to deceive," without which the action is not maintainable. But Lord Kenyon says, speaking of his ruling at Nisi Prius, "it was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge that he did not know to be true. This is fraudulent : not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of LEGAL FRAUD, such as is presumed in all the cases within the Statute of Frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know."

In Crosse v. Gardener, (Carthew, 90,) which was an action on the case for falsely affirming that goods were the property of the seller when they were not, it was held that the declaration was good though there was no scienter, and the party did not know that he was making a false statement. See also Rex v. Mawbey, 6 T. R. 637, where Lawrence, J., applies the same doctrine to perjuries it being not requisite to show wilful falsehood. The same view is even more strongly expressed by Sir James Mansfield, C. J., in Schneider v. Heath, 3 Camp. 506, where he says, "*It signifies nothing whether a man represent a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact, it turns out to be false.*" There is also a dictum of Best, C. J., exactly to the same effect, in Adamson v. Jarvis, 4 Bing. 66 : "He who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law, guilty of falsehood, and must answer in damages."

"In the case of Humphreys v. Pratt, 5 Bligh, N. I. 154, the defendant had represented to the plaintiff, a sheriff, that a judgment debtor was possessed of certain goods liable to be seized under the writ. The sheriff seized accordingly, but the goods proved not to be liable to be seized under the writ : and the declaration alleged that the defendant then and there deceived and defrauded the plaintiff in this, that the said goods and chattels were not the property of the judgment debtor. Upon this state of the record, the House of Lords held that the plaintiff below was entitled to retain his judgment, notwithstanding the declaration did not allege that the defendant below knew his representation to be untrue."

Railton v. Matthews, 10 Cl. & Fin. 934, is a decision based on the same principle with the doctrines we have just cited. It was also on appeal to the House of Lords. The respondents had not communicated certain facts affecting an agent's credit to the plaintiff, who became his co-surety in a bond to the respondents, without any communication with them, and it proved that they, the respondents, knew facts materially affecting the credit of the agent ; and in the course of the judgment Lord Cottenham said, "In my opinion there may be a case of improper concealment, or non-communication of facts, which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive."

The same principle has always been held good in policies of assurance where the mere averment that the defendant made a false statement suffices, though he made it believing it to be true. See Goram v. Sweeting, 2 Saund. 199, and cases there cited.

The mere concealment or non-communication of material facts has been held to vitiate a contract in ordinary cases of sale on agreement. See Hodgson v. Richardson, 1 Wm. B. 465, per Yates, J., who says, "The concealment of material circumstances vitiates all contracts upon principles of natural law." (See also Pilmore v. Hood, 5 B. N. C. 97.)

In Cornfoot v. Fowke, 6 M. & W. 358, Lord Abinger, C. B., was at issue with the rest of the Court on a point which involved the same distinction. The question arose on a plea of fraud and covin to an action for the rent of a house, which the agent of the plaintiff had assured the defendant there was no objection to. The plaintiff, the landlord, however,

*Now with regard to this class I need hardly say that no contract prohibited by the *express* *provisions of a statute can [*142-*143]

well knew that there was a grave objection to the house, of which he made no mention to his agent, and the agent was wholly ignorant of such objection when he made the false statement alleged in the plea. Mr. Baron Parke said, "It is I think justly said, *that it is not enough to support the plea that the representation is untrue; it must be proved to have been fraudulently made.* As this representation is not embodied in the contract itself, the contract cannot be affected unless it be a fraudulent representation, and that is the principle on which the plea is founded. Now the simple facts that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud; each person is innocent because the plaintiff makes no false representation; and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud."

Lord Abinger, C. B., on the other hand, having cited the case of *Williamson v. Allison*, 2 East, 446, and *Hodson v. Richardson*, 1 Wm. Bl. 463, held that "nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, *however innocently made*, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude." The majority of the court, however, held with Mr. Baron Parke, and gave judgment accordingly.

Nevertheless, the Court of Exchequer held a different doctrine in the subsequent case of *Smout v. Ilbery*, 10 M. & W. 1. A widow had ordered goods on the assumption that her husband, who had sailed for China, was alive, at a time when she could not have heard of his death. The question arose whether, by the order she gave for meat in her husband's name, she did not impliedly undertake that he was alive, and thus become liable for the constructive misrepresentation.

The court took time to consider, and in an elaborate judgment delivered by Alderson, B., entered upon an exposition of the law as to fraudulent misrepresentations, and having classified the different modes in which they arise said, "there is a third class, in which the courts have held that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, *it is true the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before.* It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, *even though he does not know it to be false*, but believes without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes such assertion should be personally liable for its consequences."

This case was immediately followed in the same court by that of *Moen v. Heyworth*, 10 M. & W. 147, and by *Taylor v. Ashton*, 11 M. & W. 401, where the old doctrine was resumed and the scienter held to be essential! The misrepresentation in the latter case consisted in the report of a Joint Stock Banking Company, which represented itself in a prosperous condition, and an action upon the case was brought, charging fraudulent misrepresentation and statements known by them to be untrue against the defendants by the plaintiff, who had been thereby induced to take shares. The jury found the defendants not guilty of the charge laid in the declaration, but guilty of gross negligence. Upon this the same question arose which forms the subject of the judgment in *Smout v. Ilbery*,—whether a falsehood, which misleads and injures, without fraud is actionable? And the Court held, after *Cur adv. vult.*, that moral fraud was essential to the action. The judgment states that "the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence*; and it is insisted that even that, accompanied with damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. FROM THIS PROPOSITION WE ENTIRELY DISSENT, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made." According, therefore, to the judgment in *Smout v. Ilbery*, liability exists where there is no moral fraud at all; and in *Taylor v. Ashton*, moral fraud is made indispensable to liability. In *Polhill v. Walter*, 3 B. & Ad. 114, (1832,) where

[*144] be enforced in any court of law; but it is necessary that you *should also bear in mind that an *implied* prohibition is equally fatal to its validity.

the defendant had accepted a bill *per proc.*, knowing that he had no authority to do so, but believing that the acceptance would be ratified, the Court held that *corrupt motive* was not essential to an action for the fraud; but that the defendant's *representation being "untrue to his knowledge,"* he was liable; though if he "had had good reason to believe his representation to be true, he would have incurred no liability." This judgment, which is often cited, is a refinement upon the doctrine in *Taylor v. Ashton*, and equally distinguishable from *Smout v. Ilbery*, affording no authority for either. It asserts that where there is no knowledge of the falsehood there is no liability: but it does not go to the length of saying that there must be absolute moral fraud to constitute it, for in this case there was none. Lord Denman, C. J., was of the former opinion in the case of *Evans v. Collins*, 5 Q. B. 804. That case was, however, overruled in error. (See *Collins v. Evans*, 5 Q. B. 820, before Tindal, C. J., Coltman, Erskine, and Maule, Js., and Parke, Alderson, Gurney, and Rolfe, Bs.) It was there distinctly held that fraud must concur with the false statement in order to give a ground of action.

The result of this decision on a commercial transaction is well exemplified in the subsequent and very recent case of *Ormond v. Huth*, 14 M. & W. 651; also in the Exchequer Chamber (present Tindal, C. J., Williams, Coltman, Coleridge, Maule, and Cresswell, Js.) It was an action on the case against the defendants, who were dealers in cotton, for fraud, in representing certain samples of cotton as fair samples of 142 bales, which the plaintiff was thereby induced to buy for 1646*l.* 15*s.*, whereas they were not fair samples, but of a very inferior description. The Court held, "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller unless he can show that the representation was bottomed in fraud. If, indeed, the representation was *false to the knowledge of the party making it*, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, although not true in point of fact, we think this does not amount to fraud in law; but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action; and although the cases may in appearance raise some difficulty as to the effect of a false assertion or representation of title in the seller, yet it will be found on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. The rule we have drawn from the cases appears to us to be supported so clearly by the early as well as the most recent decisions, that we think it unnecessary to bring them forward in review, satisfying ourselves by saying that the exception must be disallowed, and the judgment of the Court of Exchequer affirmed."

It is humbly submitted, that the contrary rule has the apparent sanction of the House of Lords, Lords Mansfield, Kenyon, Abinger, Denman, Sir James Mansfield, Best, C. J., and Alderson, B., whilst Justice Story thus corroborates their view:—

"Whether the party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know or believe to be true is *equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false*; and even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party." Story's "Equit. Juris." vol. i. p. 166.

It is impossible to feel confident in the permanence of the contrary doctrine when it is considered that the practical effect of the law as it is settled in *Ormond v. Huth*, and *Collins v. Evans* is to put every purchaser by sample at the mercy of the vendor. It is practically impossible, in many departments of commerce, to examine bulk. It is so in all sales of cotton, of which alone upwards of six millions of cwts. are imported into the country, sold and resold every year. It is equally impossible in most cases to prove knowledge of the fraud in the party selling. The false packing in *Ormond v. Huth* may have been done with his connivance, or he may have detected it without there being any possibility of proving it. The inconvenience amounting to impracticability of testing actual knowledge of fraud committed, is a strong reason for not requiring proof of it.

But the strongest reason of all is, that the purchaser, where he cannot prove the *animus* of the party who made the false statement, is wholly remediless in cases like that of *Ormond v. Huth*; for after acceptance he has lost the power of repudiating the contract, whereas the vendor would have his remedy in most cases against the party who sold to him and perpetrated the original fraud, and who must have done so knowingly. It is diffi-

* "Where a contract," says Lord Tenterden in *Wetherell v. Jones*, "is *expressly* or by *implication* *forbidden, no [*145-*146] court will lend its assistance to give it effect." The examples which most commonly occur in practice of implied prohibition are in [*147-*148] cases in which an act does not in *express* *terms enact that a particular thing shall not be done, but imposes a penalty upon the person *doing it. In such cases the imposition of the penalty is [*149-*150] invariably held to amount to an *implied prohibition of the thing itself on the doing of which the penalty is to accrue. In *Bartlett v.*

cult, moreover, to distinguish on principle between the injury done in such cases and those of ordinary negligence, where the injured party has his action without proving any intent to injure. If a man is defrauded by the negligent statement of another, he is surely as much entitled to a remedy, without proving *intent* to defraud, as he who is injured by the negligent act of another without proving the intent to injure. The intent is no more important in one case than the other. What is the difference between acts and statements producing like results? Is there not also risk, lest by giving an irresponsibility to false statements we engender an indifference to truth, and lessen the reliance of merchants on the integrity of statements which necessarily form the basis of half the business of commerce? It is at any rate well to inquire, whether to hold that no man is liable for the results of his false statements unless he be proved to have known their falsehood, is not to attach a virtue to ignorance and a protection to carelessness alike foreign to social economy and the ethics of jurisprudence. On these grounds it cannot but be a question whether the decisions of the Courts, thus strangely at variance with themselves and with the opinions of so many of their Chiefs—and it would appear equally so with that of the House of Lords itself—are to be deemed law, and that proof of moral fraud is requisite to constitute fraud in law,—or whether the broader doctrine thus embodied by Lord Kenyon in his memorable judgment in the case of *Haycraft v. Creasy* be not the sounder rule:—"If any become an actor in deceiving another—if he lead him by *any misrepresentations to do acts which are injurious to him, I learn from all religious, moral, and social duties, that such an action will lie against him to answer in damages for his acts.* And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this Court on the same subject."

The inquiring reader is referred for further exposition of this subject to the cases of *Jones v. Bowden*, 4 Taunt. 847; *Parkinson v. Lee*, 2 East, 314; *Meyer v. Everth*, 4 Camp. 22; *Lysney v. Selby*, 2 Ld. Ray. 1118; *Langridge v. Levy*, 2 M. & W. 519, and 4 M. & W. 337; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Vernon v. Keys*, 12 East, 632; *Adamson v. Jarvis*, 4 Bing. 66; *Fuller v. Wilson*, 3 Q. B. 58; *Chalmers v. Payne*, 2 Cr. M. & R. 157; *Moens v. Heyworth*, 10 M. & W. 155; *Freeman v. Baker*, 5 B. & Ad. 797; *Dobell v. Stevens*, 3 B. & Cr. 623; *Springwell v. Allen*, 2 East, 448 n.

Misrepresentations as to the credit of others, however fraudulent, must be in writing under the 9 G. 4, c. 14, s. 6, of which see ante, p. 56. The extent to which this statute includes such representations is decided in *Haslock v. Ferguson*, 7 A. & E. 86; and *Swann v. Phillips*, 8 A. & E. 457.

There are various other cases in which contracts may be avoided on the score of fraud; as, for instance, all fraudulent preferences or arrangements with bankrupts, which defraud the body of the creditors. (See *Alsager v. Spalding*, 4 Bing. N. C. 407; *Reay v. White*, 1 C. & Mee. 748; *Butten v. Hughes*, 5 Bing. 460; *Tabram v. Freeman*, 4 B. & Ad. 887.) So are all contracts in writing which have been altered by a party interested in them. (*Master v. Miller*, 4 T. R. 320.) Contracts made by persons who have been induced to enter into them when intoxicated or imbecile in mind are also voidable for fraud. See *Gore v. Gibson*, 13 M. & W. 623. Contracts made under some delusion known by the party who benefited by it, and to the prejudice of the party labouring under it, are fraudulent and voidable. (*Hill v. Gray*, 1 Stark. 434.) Sureties are released on the ground of fraud, from their obligation wherever, with the knowledge of the creditor, any material part of the transaction between him and the debtor be withheld from the knowledge of the surety, or any secret arrangement has taken place whereby his liability is increased. *Stone v. Compton*, 5 Bing. N. C. 142.

It is at the option of the party defrauded whether a contract tainted with fraud shall be voided or not. *Steel v. Brown*, 1 Taunt. 381. *Deady v. Harrison*, 1 Stark. 60; *Chit. Plead.* 6th edit. 480.

Viner, Carthew, 252, which is always referred to as a standard authority on this subject, the L. C. J. Holt says, "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only [*151] inflicts a penalty on the offender; because a penalty implies a *prohibition, though there are no prohibitory words in the statute." You will find this principle cited and acted on in *De Begnis v. Armstead*, 10 Bingh. 107, and *Ferguson v. Norman*, 5 Bingh. 80.

Now then, this being the general principle upon which all cases of statutable illegality depend,

It is necessary that you should bear in mind a practical distinction which exists between this class of contracts—contracts, I mean, forbidden by the *express* or *implied* enactment of some statute—and another class, in which the *contract* itself does not violate the statute, but some *incidental illegality* occurs in carrying it into effect. In these latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect.

The best mode of explaining this is by an example. In *Wetherell v. Jones*, 3 B. & Ad. 221, a rectifier of spirits brought an action against a confectioner to recover the price of spirits sold and delivered to him. The defence relied upon was illegality. It appears that, under the Excise Acts, a rectifier or distiller, when he sends out spirits, is bound to send with them a permit truly specifying their strength. The plaintiff had sent a permit, but it did not specify the true strength: and the defendant relied on this [*152] violation of the statute as an avoidance of *the sale. But the Court held, that the illegality was not in the contract to sell the spirits, but in the subsequent act of removing them without a proper permit, and, therefore, that an action was maintainable upon the contract; and Lord Tenterden's judgment sets the distinction in a very clear light:

"We are of opinion," said his Lordship, "that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is *in itself* perfectly legal; there having been no agreement, express or implied, in that contract that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books in which an action on a contract has failed because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated in the contract by the performance of something to be done on his part." (See also *Pellecat v. Angell*, 3 C. M. & R. 311; *R. v. Inhabitants of Somerby*, 9 A. & F. 311.) (a)

With regard to the distinction of which I have been speaking, I will make but one further observation, namely, that it would apply to cases of common law as well as statutable illegality; but I have spoken of it under [*153] the head of *Statutable illegality, because I do not remember any decided case arising upon a question as to illegality at common law which would aptly illustrate it. I can, however, put such a case without difficulty. Suppose, for instance, A. employs a builder to repair the front

(a) And *Ferguson v. Norman*, 5 Bing. N. C. 76, per Tindal, C. J.

of his house, and B., in so doing, erects an indictable nuisance in the public street, still, as the contract to repair the house is legal, and the erection of the nuisance in so doing was not contemplated by the agreement, the builder might recover for the repairs which he had executed. But it would be otherwise if it had been made part of the agreement, that the repairs should be performed by means of the erection of the nuisance ; for, there, the illegality would have entered into and formed part of the contract.

Now, such being the fact of illegality created by statute, in avoiding an agreement tainted with it, and such being the distinction between illegality stipulated for,—contemplated by the contract,—and illegality occurring incidentally during the course of its performance, I will proceed, as I did when speaking of illegality at common law, to specify some of the instances of most ordinary practical occurrence, in which the legislature has, by express provision, rendered particular contracts illegal.

And *first*, a contract may even now be void upon the ground of *usury* ; but the scope and effect of the usury laws have so much altered *dur- [*154] ing the last few years, that it is necessary to give you a short history of the modern enactments on that subject.

From the reign of Queen Anne down to that of William the Fourth the important statute on this subject was 12 Anne, s. 2, c. 16, which enacted that no person should take either directly or indirectly more than 5 per cent., and that all contracts to the contrary should be void. In construing this statute, it was always held that no contract, however framed, however unlike a contract for a loan or for interest it might apparently be, would hold good if the ultimate effect of it would be to secure more than 5 per cent. interest for the loan of money. Every conceivable means was used to evade the statute. Sometimes a transfer of stock, sometimes commission on a discount, sometimes a substitution of one contract for another, or several concurrent contracts were resorted to, but the effort of the Court was in every case to strip off the external covering of form, and get at the intent and real import of the transaction, and if that were tainted with usury, the contract was held void. See *Wright v. Wright*, 3 B. & C. 272 ; *Chippindale v. Thurston*, M. & M. 411 ; *Meago v. Summons*, M. & M. 121 ; *Carstairs v. Stein*, 4 M. & S. 192.(a) I cite these cases, because, as I will *presently show you, they are still important, though the law is [*155] since altered.

Now such being the law as constituted by the statute of Anne, the first relaxation was by stat. 3 & 4 W. 4, c. 98 ; that was the act renewing the

(a) A recent example of this occurred in the case of *Belcher v. Vardon*, 14 Law Jour. C. C. 427. A. being entitled to a lease of building ground for seventy years, and having borrowed money of B. agreed to assign the leases of the houses built on it to B., who was to underlet them to A. again at rents equivalent to 8 per cent. on the money advanced. Knight Bruce, V. C., held, however, that this was an usurious contract, within the large language of the statute of Anne, and that the transactions were void, as shifts and devices to evade the usury laws. And if the extra money be paid as a premium for the renewal of a loan at legal interest, it is equally usurious. (*Wood v. Grimwood*, 10 B. & Cr. 689.) All sales made to colour usurious transactions are void. *Hargreaves v. Hutchison*, 2 Ad. & Ell. 12 ; see also *Wright v. Wheeler*, 1 Camp. 165, n.; *Doe d. Grimes v. Gooch*, 3 B. & Ald. 664.

The whole law of usury will be found fully discussed in *The Earl of Chesterfield v. Jansen*, 1 Wilson, 286, since which case *Ld. Abinger* said, in *Downes v. Green*, 12 M. & W. 490, that there is none "in which any thing new is to be found."

Charter of the Bank of England; and it enacted, among other things in sec. 7, that bills of exchange and promissory notes, payable at or within three months after date, or not having more than three months to run, should be exempted from the usury law. And I suppose that this enactment was found beneficial, for, by a subsequent act of 1 Vict. c. 80, the three months were extended to twelve months. And by a still later act of 2 & 3 Vict. c. 37, it was enacted, "[*156] "That no bill or note not having more *than twelve months to run, nor any contract for the loan or forbearance of more than 10*l.* sterling, shall be void by reason of the usury laws; provided that the act shall not extend to the loan or forbearance of money on the security of any lands, tenements, or hereditaments or any estate or interest therein." This act was only to continue in force till January 1, 1842; but by stat. 3 & 4 Vict. c. 83, it was continued to January, 1, 1843; and, by 4 & 5 Vict. c. 54, to January 1, 1844.(a)

Now you will observe that none of these acts repeal the statute of Anne. They only exempt from its operation the cases provided for by 2 & 3 Vict. c. 37.(b) And that statute does not *apply to loans of money "[*157] under 10*l.*, nor cases of *loans on the security of real property*. Mortgages, for instance, which are therefore still governed by the statute of Anne, and will be void if more than 5 per cent. be directly or indirectly reserved by way of interest. You will now see why I thought it proper to cite cases on the construction of the statute of Anne. If you wish to inquire further regarding that act, see notes to *Ferrall v. Shaen*, 1 Wms. Saund. 294.(c)

(a) The 2 & 3 Vict. c. 37, has been annually extended, and by 8 & 9 Vict. c. 102, it has been again extended until the 1st January, 1851.

(b) It has been expressly so held in *Thibault q. t. v. Gibson*, 12 M. & W. 88. It follows that in pleading it is sufficient to declare in all remaining cases of usury on the statute of Ann, and it is for the defendant to plead that the case is within one of the subsequent statutes exempting it from the old law. Lord Abinger, C. B., thus stated the rule of pleading in all actions for the recovery of penalties where there are exemptions. "In all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exemption in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence. The same rule applies with increased force and efficacy to the case where penalties are given by one statute, and particular cases are, by a subsequent statute, exempted from its operation."

(c) The proviso at the end of section 1, that "nothing herein contained shall extend to the loan or forbearance of money upon security of any lands, &c., or any estate or interest therein," has been held to apply to *all* collateral securities and equitable mortgages, whether of freehold or leasehold property. (*Hodgkinson v. Wyatt*, 4 Q. B. 749.) But this must be taken with some limitation, for it was decided in the previous month by the Court of Exchequer, that where a promissory note was given and discounted *bona fide*, a mortgage of land given as a collateral security to protect it is equally valid. (*Doe d. Haughton v. King*, 11 M. & W. 33.) The distinction between these cases, if any, seems to be that, according to the latter, the jury must find that "the real object of the parties was the discounting of the note, and that being legal, it rendered the security by mortgage also legal."

In the former case the deposit of the deed was named in the bond, and might, perhaps, be deemed part of the primary, rather than as the secondary, security.

And it has been held that where a deposit of such deeds is made merely as an inducement to forbear suing upon bills of exchange protected by the recent statutes, and bearing more than 5*l.* per cent. interest, such deposit does not withdraw the bills from the operation of those statutes, and they remain valid. *Bell v. Coleman*, 5 Jur. 974.

Previously to the 2 & 3 Vict. c. 37, and under the 7 Will. 4, and 1 Vict. c. 80, there was

*The next example to which I shall advert arises on the acts against gaming. These are exceedingly complex and troublesome; [*158] but it is absolutely necessary to direct your attention to them, for questions upon them are continually occurring in practice.

The first act is that of 16 Car. 2, c. 7, s. 3, which enacts that if any one shall play at any pastime or game, by gaming or betting upon *those who game, and shall lose more than the sum of 100*l.* on credit, he [*159] shall not be bound to pay, and any contract to do so shall be void.

The 9th Anne, c. 14, (the principal enactment) provides in sect. 1, that all securities for money or any other valuable thing won by gaming or playing at cards, dice-tables, bowls, or other game whatever, or by betting on those who game, or for money lent for such gaming or betting, or lent to gamblers at the place where they are playing, shall be void.

And the second section enacts, that any person who shall at a sitting lose the sum or value of 10*l.* may recover it back again within three months; and if he do not, any other person may, together with treble the value, half for himself, and half for the poor of the parish.

Now you will observe that, that under these two acts, securities for money lost at gaming, or by betting on gamblers, or for money lent to them to game with, are illegal.

And you will further observe that, even if no security be given, but the loser pay in cash, still, if the sum lost amount to 10*l.*, it may be recovered back again.

You may consult, on the construction of these acts, *Sigell v. Jebb*, 3 Stark. 1 *Brogden v. Marriott*, 3 Bingh. N. C. 88 and; *M. Kennill v. Robinson*, 3 M. & Welsb. 134.

Now a *horse race* is a *game* within the meaning of these acts of parliament, as you will find laid *down in *Goodburn v. Marley*, Str. 1159, *Blaxton v. Pye*, 2 Wilson, 309, and *Brogden v. Marriott*, 3 Bingh. [*160] N. C. 88; and, therefore, if the law rested upon the statutes, all losses above 10*l.* on any such race would be recoverable back by the loser, and would put the winner in danger of the penalties of the statute of Anne, and securities for the payment of any such losses would be *void*. But it was thought that horse racing, confined within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large: acts of parliament have therefore been past, providing for this particular object, and excepting such races, to a certain extent, from the provision of the gaming acts. This was first done by stat. 13 Geo. 2, c. 19,

nothing to render it less legal to protect such a payment by security on land than in any other way. In fact, in all cases the Courts look to the substance of the agreement and the real intent of the parties. *Beete v. Bidgood*, 7 B. & Cr. 458.

The new statutes have materially reduced the difficulties upon which the cases used to turn. It is enough to state generally, that, as before, it is still necessary that the original agreement must have been *usurious* to be avoided for *usury*: no subsequent reservation of *usurious* interest suffices. There must also be an actual receipt of the interest to render the offence penal though the contract is void without it. *Wood v. Grimwood*, 10 B. & Cr. 679.

Where a pawnbroker advanced a sum exceeding 10*l.*, at more than 5 per cent. interest, on a pledge of goods, without making an entry or delivering a duplicate, in compliance with stat. 39 & 40 Geo. 3, c. 99, s. 6, it was held that the transaction was legal, inasmuch as that statute allows pawnbrokers 20 per cent., and does not apply to loans of more than 10*l.*, and that such loans are within the protection under the 2 & 3 Vict. c. 37. *Pennell v. Attenborough*, 4 Q. B. 868; and see *Turquand v. Mosdon*, 7 M. & W. 504.

which legalised matches run at Newmarket, at Black Hamilton, or for the sum of 50*l.* and upwards. But this statute imposed certain restrictions as to the weight which the horses were to carry, which it seemed expedient to repeal, and for that purpose was passed the 18 Geo. 2, c. 34, s. 11, which, after reciting the restriction of the former statute as to weights, enacts that it shall be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the value of fifty pounds or upwards, at any weights whatever, in the same manner as if the act of the 13th of Geo. 2, had never been made.

[* 161] This act you will at once see, was made **merely* to take away the restrictions with regard to weight which had been imposed by the 13th of Geo. 2; but, though that was its object, by one of those strange accidents which are so common in the history of English law the legality of all horse-racing has come to depend upon it.

In the first section of the 13th Geo. 2, there was a very strange and unaccountable enactment. It enacted that no person should start more than one horse for the same plate; and that, if he did, all the horses entered by him except the first, should be forfeited, and recovered by information or action at the suit of a common informer. The law regarding racing, mixed up as it is with the other gaming acts, being extremely complex, this portion of it was probably forgotten, and certainly was not universally acted upon, when suddenly about three years ago, informations were filed for the purpose of recovering several valuable race-horses, which had been entered by their owners, along with other horses their property, for the same stakes, in total ignorance of the prohibition of the act of Parliament.

As soon as this was represented to the legislature, it interfered for the protection of the defendants, and passed the 3 Vict. c. 5; but that Act, I presume, inadvertently, instead of repealing so much of 13 Geo. 2, as inflicted

[* 162] **penalties, repealed that Act altogether so far as it related to horse-races.*

Now it has always been supposed that the legality of horse-races depended on the 13 Geo. 2, and that the 18th of the same reign was a subsidiary Act, and had merely the effect of taking off restrictions as to weight. And many persons therefore thought that the Act of 3 Vict. c. 5, instead of effecting the object of the legislature by protecting horse-races, had repealed the only enactment by which they were supported, so that they have been thrown back into the class of games comprised within the statute of Anne, and would be illegal if for a larger stake than 10*l.* At length the question arose, and was argued in a case of *Evans v. Pratt*, Law Jour. 1842, C. P.

[* 163] 87, (a) in which **the Court of Common Pleas* decided that the words of the 11th sect. of the 18 Geo. 2, c. 34, were large enough to legalise all

(a) This case decides that a steeple-chase for 50*l.* or upwards is legal. (3 M. & Gr. 759.) The judgment of Maule, J., gives the law on races as it now stands:—"I think the 11th section of the 18 Geo. 2, c. 34, is to be read thus:—'It shall be lawful for any person to run any match for 50*l.* or upwards, at any weights whatsoever, and at any place whatsoever, without incurring the penalties in the Act of 13 Geo. 2, c. 19, and without incurring any other illegality under any previous statute.' If that be the true construction of this section, the repeal of the 13 Geo. 2, c. 19, will not have the effect of taking away the legality of any race which was legal before the passing of the repealing statute. Then the only question is, whether the eleventh section of the 18 Geo. 2, c. 34, extends to this case. As that statute is one which takes away penalties, it ought to be largely expounded. The object of the legislature throughout

horse-races for stakes of 50*l.* and upwards. Such races are therefore legal, and it is settled by *Bidmead v. Gale*, 4 Bur. 2432, that a race for 25*l.* a side is a race for 50*l.*(*a*)

*But though a race for 50*l.* is thus legalised, a bet on such a race is not so, for the case of *Shilleto v. Theed*, 7 Bing. 403, has [*164] decided that a person betting, even on a legal horse-race, is in the same situation as if he had betted upon any other game.(*b*)

Now there is one point not perhaps precisely forming part of, but strongly bearing on this subject, and of which I must here warn you. When I speak of the statutes of Charles and *Anne as rendering bets of a greater amount than 10*l.* recoverable back from the winner, and [*165] rendering all securities for bets void, you must understand me to speak of bets on persons gaming; for the words of the former statute are, "by playing at the games or betting on the players," and of the latter and more important one, "betting on the sides of such as game at any of the aforesaid "games." All wagers therefore are not affected by these statutes, but only wagers upon *games*. Now a *foot-race* is a *game* within these Acts; *Lynall v. Longbotham*, 2 Wils. 36. So are *cards, dice, tennis, bowls*, for they are mentioned in the Acts; and so is *cricket*, though not specified; *Hodson v. Terrill*, 3 Tyrw. 929; not that there is any thing illegal in these amusements themselves, but that the law will not allow the winner of 10*l.* or upwards

these enactments has been to encourage the production of a strong and powerful breed of horses; and I think that this was a race calculated to further that object. The only doubt is raised by the language held by Lord Eldon, C. J., in *Whaley v. Pajot*, 2 Bos. & Pull. 51. The decision in that case merely goes to this, that a race of two horses against one is not a horse-race within the meaning of the statutes. Lord Eldon is reported to have said that "there seems to be much ground for arguing from the nature of the 16 Car. 2, & 9 Anne, that these acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing, and that the 13 & 18 Geo. 2, are, from their nature, to be so construed as to encourage the breed of horses, and to permit that species of horse-racing only called racing on the turf." Lord Eldon does not say, to permit only "races on the turf," but that "species of racing." I see nothing, however, in the acts to require so narrow a construction; and I think it is not too much to say, that the statutes extend to all races between two horses running at the same time from one point to another point. It cannot be doubted that such races were assumed to be legal when the statute of 3 & 4 Viet. c. 5, passed."

(*a*) These statutes and cases were reviewed at great length in the case of *Applegarth v. Colley*, 10 M. & W. 723, which decides that a horse-race for a sweepstakes of 2*l.* each is not illegal, although the total amount subscribed and run for amounted to less than 50*l.*, inasmuch as neither the statute of Charles (it being a ready money payment) nor the statute of Anne apply to a "race for a sum of money not raised by the parties themselves (that being, in truth, a wager,) but given by way of prize by a third person desirous of encouraging racing." Nevertheless it appears that the 18 Geo. 2, c. 34, still in force, renders any race run for less than 50*l.* illegal; for, if races run for less sums were not illegal, there could have been no reason why either the 13 Geo. 2, or the 18 Geo. 2, should legalise what was already legal. And the judgment in *Evans v. Pratt* fully confirms Mr. Smith's opinion that the legality of horse-racing depends on the 18 Geo. 2, c. 34, (which the 3 & 4 Viet. c. 35, does not repeal,) and it expressly limits its legalising effect to races for stakes of 50*l.* or upwards. *Applegarth v. Colley* is inconsistent with this view, and asserts that the statute of Charles makes such gaming only illegal as is "fraudulent and excessive," and that it has no reference to the cases of persons fairly running horses for money, or fairly betting on races or other sports of like nature.

The case of *Bentinck v. Connop*, 5 Q. B. 693, shews that all races are illegal under the statutes of Charles, where the stake exceeds 100*l.*, and is not paid down, and it upholds the view that the legality of racing depends on the 18 Geo. 2, c. 34. *Daintree v. Hutchinson*, 10 M. & W. 85, decides that a dog-race is within the statute of Charles.

The stake is the aggregate of the sums subscribed. *Challand v. Bray*, 1 Dowl. N. S. 783.

(*b*) See next note.

to receive or retain his winnings, nor will it allow any security for any winnings at them to be enforced. But as to wagers not made upon *games* within the meaning of these Acts of parliament, if there be nothing illegal or opposed to public policy in the subject-matter of the wager, there is no statute which affects its validity.^(a) This was decided in the *famous [*166] case of *Goode v. Elliott*, 3 T. R. 693, in which the wager, whether a particular person had, before a particular day, bought a wagon, was held legal, and the winner allowed to recover against the loser, in an action, by three judges contrary to the opinion of Mr. J. Buller, who advocated the view which probably would have been most consistent with sound policy, namely, that the Courts should refuse to occupy their own time and that of the public by trying such questions. However, the decision in *Goode v. Elliott* is supported; *Hussey v. Crickett*, 3 Camp. 168, and *Jones v. Randall, Cowp. 37*; and indeed the point is so well recognised, that all issues sent from the Court of Chancery to be tried at law, are, in the absence of special directions to the contrary, framed as upon wagers; and in *Evans v. Jones*, 5 Mee. & Welsb. 82, one of the learned Barons says: "It is too [*167] late now to say that no wager can be enforced at law, *though I "think it would have been better if they had been originally left to "the decision of the jockey club." In that particular case the wager was held invalid on the ground that, under the particular circumstances, its tendency was to obstruct the course of public justice, which is an objection sufficient, as I have already explained in the commencement of the lecture, to invalidate a contract at common law.

There is, however, one class of *wagers* besides those on *gaming* which are invalid by the statute law. I allude to wagers in the shape of policies of insurance. An insurance, as you doubtless are aware, is a contract by which, in consideration of a premium, one or more person or persons assure another person or persons in a certain amount against the happening of a particular event; for instance, the death of an individual, the loss of a ship, or the destruction of property by fire. These three classes of policies, upon *ships*, *lives*, and *fire*, are the most common of occurrence; but there is nothing to prevent insurance against other events; for instance, in *Carter v. Boehm*, 3 Burr. 1905, one of the most celebrated cases in the Reports, Lord Mansfield and the rest of the then Court of Queen's Bench, supported a policy of insurance against foreign capture effected on a fortress. Now, [*168] this contract of insurance, though one of the most *beneficial known to the law, since it enables parties to provide against events which

(a) It is otherwise now. By 8 & 9 Vict. c. 109, s. 18, "all contracts or agreements whether by parol or in writing, by way of gaming or wagering, are null and void; and no suit is to be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which may have been deposited in the hands of any person to abide the event on which any wager may have been made." But this enactment is not to apply to "any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

This sweeping enactment applying to bets on races and all wagers, renders it unnecessary to enter upon the many subtle distinctions taken upon the bearing of the statute of Anne, and which will be found discussed in *Applegarth v. Colley* (supra); *Thorpe v. Coleman*, 14 Law Jour. C. P. 260; *Bentinck v. Connop*, 5 Q. B. 693; *Fisher v. Waltham*, 4 Q. B. 889; *M'Kinnell v. Robinson* (supra); see also 5 & 6 W. 4, c. 41.

no human skill can control, to provide, for instance, against the ruin of a family by the sudden death of a parent, the ruin of a merchant by the loss of his venture at sea, or of a manufacturer by the outbreak of a fire on his premises, though productive, therefore, of most beneficial consequences to society, yet is very liable to be abused, and made an engine of mere gambling; for instance A. insures B.'s life; i. e. he pays so much a year, or so much in the lump, to some one who is to pay him so much upon B.'s death. If B. owes him money, and his object is to secure himself, it is a *bonâ fide* insurance; but, if B. is a mere stranger, in whose life he has no interest, it is a mere wager. In order to prevent the contract of insurance from being thus abused, statute 14 G. 3, c. 48, prohibits wager policies, as they are called, altogether: prevents a man from insuring an event in which he has no interest. And where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest. The effect of this act, in a word, is to invalidate wagers framed in the shape of policies of insurance, thus in *Paterson v. Powell*, 9 Bing. 320, a wager on the price of Brazilian shares framed like a policy was held invalid.

*This Act applies to all subjects of insurance except marine risk, and they are provided for by the insertion of a similar prohibition [*169] contained in 19 G. 3, c. 37.(a)

*LECTURE VII.

[*170]

STOCK JOBBING ACT.—THE LORD'S DAY ACT.—SIMONY.—BILLS OF EXCHANGE FOR ILLEGAL CONSIDERATION.—RECOVERY OF MONEY PAID ON ILLEGAL CONTRACTS.

THERE are some other heads of statutable illegality which are frequently set up as affording an answer to any attempt to enforce contracts vitiated by them. I directed your attention, on the last occasion, to the defences which arise under the usury laws, and the laws enacted for prevention of gambling; noticing the exception in favour of horse-races, and the invalidity of certain wagers not falling within the statutes against gaming, by reason of the Acts of Parliament which prohibit wagering insurances. The first class of cases to which I will advert this evening, consists of those contracts which fall within the prohibition of what are called the stock-jobbing acts.

The Act against stock-jobbing, is the 7th of Geo. 2, c. 8, which was a temporary Act, but was continued and made perpetual by the 10th of the same reign, c. 8. And it enacts, in substance—for the section is a long and verbose one—but, in substance, it enacts, that all contracts in the nature of wagers, relating to the *then present or future price of stock, or other public securities, shall be void; and that all premiums paid [*171]

(a) Though Insurance Offices have a full right to avail themselves of the above stated deficiency of the required interest, they rarely do so unless there is reason to apprehend fraud. See *Dowdeswell on Insurances*, p. 62, where the law on the subject is clearly explained.

on any such contracts shall be recoverable back again by an action of debt, for money had and received.

It has been decided on the construction of this Act of Parliament, that it was not intended to apply to any except British securities, and, consequently, that it does not prohibit gambling in the foreign funds. The question was long contested, but has been finally decided by *Wells v. Porter*, 2 Bing. N. C. 722, *Oakley v. Rigby*, 3 Scott, 194, 2 Bing. N. C. 732, *Robson v. Fal-lows*, 3 Bing. N. C. 392.(a)

Another class of contracts are those falling within the operation of the statute commonly known by the name of the Lord's Day Act. It is 29 Car. 2, c. 7, and it enacts that no tradesman, artificer, workman, labourer, or other person whatever, shall do or exercise any worldly labour or business, or work of their ordinary callings upon the Lord's day (works of necessity or charity only excepted,) and that every person of the age of fourteen years offending in the premises shall forfeit five shillings. The contracts prohibited by this statute are, you will observe, not every contract made on Sunday, but contracts made in the exercise of a man's *trade or ordinary calling*: [*172] thus, it has been decided in **R. v. Whitnash*, 7 B. & C. 59, that a contract made on Sunday by a farmer for the hire of a labourer is valid. The Court decided, in the first place, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesman, artificer, workman, labourer, or other person whatsoever," was to prohibit the classes of persons named and other persons *ejusdem generis*, of a like denomination; and they did not consider a farmer to be so. And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling*, for, said Mr. J. Bayley, those things which are repeated *daily* or *weekly* in the course of trade or business, are part of the ordinary calling of a man exercising such trade or business; but the hiring of a servant for a year, does not come within the meaning of those words."

The former of the two points decided in this case furnishes a very good exemplification of the celebrated rule of construction as applied to statutes, namely, that where an act mentions particular classes of persons, and then uses *general* words, such as "*all others*," the general words are restrained to persons of the like description with those specified: the same construction was put upon the Lord's Day Act in a subsequent case, that of *Peate v. Dicken*, 1 C. M. & R. 422, 5 Tyrw. 116, where it was decided **first*, [*173] that an attorney was not within the description of persons intended by the statute; and secondly, that, if he were, an agreement made on Sunday to become personally responsible for the debt of a client, could not be said to fall within his *ordinary calling*.

The cases in which the act is most frequently sought to be applied are those of sales, of which you may see instances in *Fennell v. Rider*, 5 B. & C. 406, *Simpson v. Nicholls*, 3 M. & W. 240. Yet, from the application of the act to those cases even, there are some exceptions; some created by the act itself, which permits food to be sold in inns and cookshops to persons who cannot be otherwise provided, and for the sale of milk at certain hours;

(a) All wagers are void of this and every other description by 8 & 9 Vict. c. 100, s. 18. See ante, p. 165 n.

others, by 10 & 11 W. 3, c. 24, which legalises the sale of mackarel before and after divine service; others by 5 & 6 W. 4, c. 37, which allows *bakers* to carry on their business to a certain extent and under certain restrictions, and, indeed, even before the passing of that act, or of the 34 G. 3, c. 61, on the same subject, it has been decided that a baker baking provisions for his customers was out of the purview of the act altogether, as being a work of necessity: (see *R. v. Cox*, 3 Burr. 787; *R. v. Younger*, 5 T. R. 449:) and there are other exceptions created by other particular enactments, as, for instance, in case of hackney carriages.

Another class of contracts falls within the prohibition of the acts aimed against *simony*. *There are two statutes on this subject; the 31 Eliz. c. 6, and 13 Ann. c. 12; the former of which enacts that if [*174] any *patron*, for any corrupt consideration by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity,—such presentation shall be void, the presentee shall be incapable of enjoying the benefice, and the Crown shall present to it.

The other statute is that of 12 Ann. s. 2, c. 12, which enacts that if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation to any living ecclesiastical, and it shall be presented thereupon, the contract is declared to be simoniacal, and the presentation is to devolve upon the Crown.

It was decided on the construction of the former Act, that of Elizabeth, very soon after it passed—that a contract to purchase a living actually vacant at the time of the purchase was a Simoniacal contract, and avoided by the operation of the statute. That was taken for granted in *Baker v. Rogers*, Cro. Eliz. 788, which was decided but a very short time after the passing of the Act; but still, although, after the statute of Elizabeth, it was admitted that to contract for the right to present to a church *actually void* was simony, yet, it was also held, that it was not simony to purchase the next presentation at a time when the church was full, *and it was therefore uncertain when that presentation would accrue (see Cro. [*175] Eliz. 686, *Smith v. Shelborne*.) And so the law continues to be to this day, with a qualification introduced by the statute of Anne, the nature of which I am about to explain to you.

The statute of Elizabeth, and the decisions upon it, had, as I have just said, established two points; first, that the right to present to an actually void benefice could not be purchased; secondly, that the right of next presentation might be so, provided that the living was full at the time of the contract. Certain clergymen took advantage of this state of the law to purchase next presentations, with the intention of presenting themselves, upon the occurrence of a vacancy. This practice, being considered highly indecorous, the statute of the 12th of Anne was passed to put a stop to it, and that Act renders it illegal and simoniacal on the part of a *clergyman* to purchase the next presentation to a living actually full, and to present himself, leaving the right of a layman to do so just as it stood before under the Act of Elizabeth.

The operation of these two statutes was elaborately discussed, first in the Queen's Bench, and subsequently in the House of Lords, in the great case of *Fox v. Bishop of Chester*, 2 B. & C. 635, and 6 Bing. 1. In that case the incumbent of a living was exceedingly ill, and upon his death bed.

[*176] The proprietor of the advowson and *another person being aware of this, and believing that his death was at hand, agreed for the sale of the next presentation, and in order to carry the agreement into effect, executed a deed a few hours only before his death, which purported to convey the advowson to the vendee for ninety-nine years, but contained a proviso for re-conveyance as soon as one presentation should have been made. After the death of the incumbent, the vendee under this deed presented a clergyman who was in no way privy to the bargain, and, consequently, the only question was as to the legality of the bargain itself, and it was strongly urged that it was void; for, it was contended, that the transaction was a fraud upon the statute of Elizabeth, since, under the circumstances, the living was for every *practical* purpose vacant at the time of the contract, although it was possible that the incumbent might linger on for a few hours after the delivery of the deed. And such was the opinion of the Court of Queen's Bench, who delivered their judgment accordingly. But it was carried to the House of Lords, and there reversed according to the unanimous opinion of the other judges, and of Lord Eldon, who was at that time Chancellor. Connected with, and, indeed, forming a part of this branch of the subject, are the decisions with regard to *resignation bonds*, the history of which is extremely curious. (a)

[*177] *It had become a very common practice when the patron of a living had a son intended for the church, and the living happened to become vacant during the young man's minority, for the patron to present a clergyman, who entered into an agreement to resign as soon as the patron's son should be of age to hold the preferment. These contracts were usually made by way of bond, conditioned to resign on the contin-

[*178] gency happening, and which, from the nature of the *transaction acquired the name of *Resignation Bonds*. At first a doubt was entertained whether these bonds did not offend against the provisions of the Act of Elizabeth, since the clergyman who executed such an instrument could hardly be said to have been presented gratuitously, inasmuch as he agreed to bind himself in the penal sum as a condition precedent to his obtaining the preferment, and inasmuch as in case of his refusing to

(a) The following summary of the Law of Simony as it now stands, is given in Mr. Cripp's able "Treatise on the Laws relating to the Church and Clergy," p. 495.

"It is not simony for a layman, or spiritual person not purchasing for himself, to purchase while the church is full either an advowson or next presentation, however immediate may be the prospect of a vacancy; unless that vacancy is to be occasioned by some agreement or arrangement between the parties.

"Nor is it simony for a spiritual person to purchase for himself an *advowson*, although under similar circumstances. If either a layman or spiritual person purchase an *advowson* while the church is vacant, a presentation by the purchaser upon any future avoidance, after the church has been filled for that time, is not simony.

"It is simony for any person to purchase the next presentation while the church is vacant.

"It is simony for a spiritual person to purchase for himself the next presentation, although the church be full.

"It is simony for any person to purchase a next presentation, or if the purchase be of an *advowson*, the next presentation by a purchaser would be simoniacal, if there is any agreement or arrangement between the parties at the time of the purchase for causing a vacancy to be made.

"If any person purchase an *advowson* while the church is vacant, a presentation by the purchaser for that vacancy is simony."

resign, and allowing the penal sum to be forfeited, he actually would have given up that sum of money for the sake of holding the living. However, in *Johns v. Lawrence*, Cro. Jac. 248, first the Queen's Bench, and then the Exchequer Chamber, decided that such an instrument was good: and the reason assigned for this was, that a father is bound by nature to provide for his son, and therefore that, though the clergyman was prevented under an agreement, yet it was not an agreement upon any corrupt consideration, but more resembled the case of a bond to resign in case of non-residence or of taking any other living, which had both been decided to be for the good of the public, and free from any objection on the score of simony. But still another question remained, for in course of time it became usual to exact from the clergyman a bond conditioned to resign—not on the patron's son, or any other particular person becoming qualified to hold the living—but to resign *generally* at the request of *the patron whenever he should think proper to signify it. These bonds, which were called *General Resignation Bonds*, stood, it is obvious, on a different footing from the former ones, for they reduced the clergyman to a state of complete dependence on the will and pleasure of the patron. However, in *Ffytche v. The Bishop of London*, which is reported in *Cunningham on Simony*, 52, and was finally decided in the year 1783, first the Court of Common Pleas, and then that of the King's Bench, decided that such bonds were valid. But, on a writ of error to the House of Lords, that decision was reversed by a majority of lay peers voting against the expressed opinion of a majority of the judges. After that period there was for a long time a strong inclination on the part of the Courts to confine the authority of that decision of the peers to cases precisely similar to itself, as you will see from the judgments in *Bagshaw v. Bosley*, 4 T. R. 78; *Partridge v. Whiston*, 4 T. R. 359; *Newman v. Newman*, 4 M. & S. 71. However, at last, in the year 1826, the matter came again before the House of Lords in the case of *Fletcher v. Lord Sondes*, 3 Bing. 501, under the following circumstances.

An action was brought in the Queen's Bench by Lord Sondes against the Reverend William Fletcher upon a bond of 12,000*l.* The condition was not to commit dilapidations, and to resign within a month after request the rectory of Kettering *in the county of Northampton, to which Lord Sondes then presented him, in order that his lordship might be enabled to present one of two younger brothers, whose names the condition specified. Upon this bond, judgment was allowed to go by default; and a writ of error being brought in the House of Lords, the judges were called on to deliver their opinions, which they all did with the exception of Mr. J. Bayley, Mr. J. Holroyd, and Mr. J. Littledale. There was a difference of opinion amongst them, and they delivered their opinions therefore *seriatim*; the judges who thought the bond valid being L. C. J. Best, Mr. J. Burrough, and Mr. J. Gaselee; those who thought it invalid being the L. C. J. Abbott, C. B. Alexander, Mr. J. J. A. Park, Baron Garrow, B. Graham, and B. Hullock. The Chancellor agreed with the majority, and the judgment of the court below in favour of the plaintiff was reversed. Now the bond in this case was not a general resignation bond. It was a special one in favour of the obligees, two brothers. And the effect of this decision was, not only to establish the decision in the *Bishop of London v. Ffytche*, but to overturn the decisions which had previously taken place in favour of

special resignation bonds, and render all bonds conditioned for the resignation of a clergyman illegal. But as the consequences of this would have been exceedingly hard upon persons, who had executed special [*181] *resignation bonds at the time when they were looked upon as legal, the Archbishop of Canterbury immediately brought in a bill which he laid on the table of the House as soon as the Lords had assented to the Chancellor's motion to reverse the judgment of the Queen's Bench in *Fletcher v. L. Sondes*, and which afterwards passed into law. It is the 7 & 8 Geo. 4, c. 25, which confirms such bonds and contracts if made before the 9th of April, 1827, the day of the decision in *Fletcher v. Lord Sondes*, for resignation in favour of one, or one of two specified persons. And thus the law continued; all general bonds of resignation being void, and special ones in favour of one person, or one of two persons, good if before April 9th, 1827, and void if subsequent to that day, until the passing of the 9 Geo. 4, c. 94, which rendered special resignation bonds and contracts entered into after the passing of that Act good, if in favour of one, or one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grand-nephew to the patron, by blood or marriage.

Thus stands this curious branch of law. Resignation contracts prior to April 9th, 1827, being governed by 7 & 8 Geo. 4, c. 25, conjointly with the statutes of Elizabeth and Anne, between that day and the passing of 9 Geo. 4, c. 94, by the statutes of Anne and Elizabeth, as explained in *Fletcher v. Lord Sondes*; and, subsequently, *by the 9 Geo. 4, c. [*182] 94, in conjunction with the statutes of Anne and Elizabeth.(a)

Another class of illegal contracts, of not unusual occurrence, consists of those which are invalid, on the ground that they amount to illegal attempts to charge an ecclesiastical benefice. The obvious impolicy of allowing the provision made by law for the support of the church to be diverted to secular purposes, occasioned the enactment of the 13 Eliz. c. 20, which directs that all *chargings* of benefices other than rents reserved upon the leases which the law allows to be made should be void. This act was repealed by 43 Geo. 3, c. 84, but revived again by 57 Geo. 3, c. 99. The cases have mostly arisen on contracts made for the purpose of charging an annuity granted by a clergyman upon his benefice. These contracts are held void, (see *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Flight v. Salter*, 1 B. & Ad. 673) and, where it appears on the face of a warrant of attorney given by a clergyman, that his intention in executing it was that the benefice [*183] *should be sequestered towards the liquidation of an annuity or other charge, the Courts will set it aside, (*Saltmarsh v. Hewett*, 1 Ad. & Ell. 812; *Newland v. Watkins*, 9 Bingh. 113,) though they will not do so where no intention to create such a charge appears on the face of the warrant of attorney itself, though its effect may and probably will be to occasion an execution to issue, under which the profits of the benefice will be seques-

(a) By this final enactment, (9 Geo. 4, c. 94,) which regulates the ground of any bond of resignation, the settled law is, "that no other or collateral condition can be annexed to a resignation, which must take place *pure, spontè, et simpliciter*, in order to exclude all indirect bargains not only for money, but for any other valuable consideration." See *Cripps*, p. 569.

It should be however noted, that the case of an exchange of benefices creates this exception, i. e. that a resignation for such purpose is legal, provided that it be made for this sole object, and that the exchange take full effect.

tered: *Bendry v. Price*, 7 Dowl. 753; *Colebrook v. Layton*, 4 B. & Ad. 578; *Moore v. Ramsden*, 7 A. & E. 898.

I have now touched upon the classes of contracts invalidated by express enactment, which are of most frequent and practical occurrence,^(a) and it remains to mention one point, also, arising from a late statute, which has done away with a distinction which was formerly found an exceedingly troublesome one, and frequently very unjust in its operation.

You are probably aware that the general rule of the law of England is that a *contract* is not *assignable*; that is, a man who has entered into a contract cannot transfer the benefit of that contract to another person, so as to put that other person into his own place, and entitle him to maintain an action upon it in case of its non-performance. But, you are probably also aware, that there are some contracts which, by the ^{*}operation either of a statute, or of some peculiar rule of commercial law, are exempt- [*184] ed from the operation of the above rule, and rendered transferable in the same way as any other property from man to man.

Such are bills of exchange which, by the law merchant are transferable by *indorsement*, if payable to order, by *delivery* if payable to bearer. Such, too, are promissory notes, which, by the statute of 4 Anne, c. 9, are placed on the same footing with bills of exchange. Now, where some one of these instruments had been made upon an illegal consideration; where, for instance, a bill of exchange was accepted for an illegal gambling debt, it is obvious that no action could be maintained between the original parties to it; for instance, in the case I have just put, by the drawer of such a bill against the acceptor of it; for, as between them, it is the common case: they both knew of the illegality, and, nevertheless, with their eyes open, made it the consideration of their contract. But, where the instrument had gone out of the hands of the person to whom it was originally given, and had got into the hands of some third person, the case is very much altered; for he might not, and, probably, did not know of any illegality; and, if he did not, it was hard that he should lose the benefit of that for which he had paid, in consequence of the illegal act of other persons, in which he did not participate, and of which he did not know. For instance, to take again the ^{*}same example:—A loses 100*l.* to B. at whist, and accepts a bill for the amount. If B. afterwards sues A. on that note, and A. pleads [*185] the illegality, this, though not perhaps in conformity with the very nice principles of honour, cannot be said to be a hardship upon B., for he knew when he sat down to play, and he knew when he drew the bill, that he could not enforce such a demand. But, suppose, instead of suing on the acceptance himself, he has procured C. to discount it, and had indorsed it to him, and C. had paid full value for it, and knows nothing of the gaming debt for which it was given. In such a case it would be an exceedingly hard thing indeed to prevent C. from recovering the amount from the acceptor. Yet, notwithstanding this, there were till lately several cases in which he would have been precluded from doing so.

The law stood thus:—Whenever illegality depended on the common law, or on an act of parliament which did not in express terms render the security void, *there* the Courts applied the rule which reason and justice

(a) See "Contracts by Public Companies," post.

dictate, and held, that the person who had given value for the security, and had taken it without notice that it was affected by any illegality, was entitled to recover upon it. There were, however, some cases in which, by the positive enactments of particular statutes, the security was rendered void. Such, for instance, was an acceptance of the description I have just supposed, given for *a gaming debt. Such also, at one period, was a bill or note given upon a usurious consideration. But the hardship in the case of usury was found so great, that a particular act, 58 Geo. 3, c. 93, was passed in order to put an end to it. And, at length, stat. 5 & 6 Will. 4, c. 41, has altogether made an end of the distinction, and the grievances which it occasioned, by enacting that such instruments shall be no longer *void*, but shall be deemed and taken to have been given for an *illegal consideration*; the consequence of which is that they are still void as between the original parties, and also as against all persons who have taken them with notice of the illegality, or after they had become overdue, or without giving value for them; but good in the hands of every person who has given value, and taken the instrument before it was due and *bonâ fide*. The only case as yet decided in this statute is *Hitchcock v. Way*, 6 Ad. & Ell. 943.(a)

*There is one other point which I will notice before altogether leaving the head of illegality. I have hitherto spoken of illegality as avoiding a contract, and of course as operating by way of defence to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed—that money, for instance, has been paid in pursuance of it—*no action will lie to recover that money back again*. At an early period of the law it was thought that such an action might be perhaps maintainable upon the ordinary principle, that an action will lie to recover back money which has been paid on a consideration which has failed. Thus, for instance, in the common case of an insurance, supposing that I insure a ship during a voyage, and she never sails upon it, I should be entitled to recover back the money as paid upon a consideration which had failed; for the consideration for my paying

(a) See *Robinson v. Reynolds*, 2 Q. B. 196. Now, however, the 8 & 9 Vict. c. 109, s. 18, as we have seen, has rendered all contracts on games and wagers, not merely illegal as to the consideration, but absolutely void.

Where it is proved that a note has been obtained by fraud or tainted by illegality, that affords a presumption that the person who has been guilty of the illegality, will dispose of and place it in the hands of some other person to sue on it: such proof, therefore, casts on the plaintiff the burden of shewing that he was an indorsee for value. (See *Bailey v. Bidwell*, 13 M. & W. 73.) But where an issue is joined on a plea of *non accepit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants shew that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction. *Musgrave v. Drake*, 5 Q. B. 185; see also *Braithwaite v. Gardiner, Bart.*, 15 Law Jour., Q. B. 187; *Pitt v. Chappelow*, 8 M. & W. 616.

A variety of cases have been decided on different transactions, upon the principles laid down above. See amongst others, *Daniels v. Coombe*, 2 M. & Gr. 347; *Jeffrey v. Evans*, 14 Law Jour. Excheq. 363; *Baker v. Walker*, 14 Law Jour. Excheq. 371; *Brooks v. Mitchell*, 9 M. & W. 15; *Brown v. Philpot*, 2 M. & Rob. 285, per *Ld. Denman*; *Scott v. Taylor*, 6 Jurist, 464, C. P.; *Wood v. Connop*, 5 Q. B. 292.

As regards admissions on the record, see *Robins v. Maidstone*, 4 Q. B. 811, and *Smith v. Martin*, 9 M. & W. 304.

the premium was the risk the underwriter was to take upon himself, but as the risk was to be contemporaneous with the voyage, and as that never commenced, so neither did the risk, and consequently, nothing was ever given in exchange for the money. So, in the ordinary case of an action for the deposit. If A. sells an estate to B., B. paying a part of the purchase money as a deposit, if A. afterwards prove unable to make out a title, B. may recover back the money deposited for the consideration, for it was the sale, which has become abortive. Such are the common cases, such the common rule; where money has been paid upon a consideration which totally fails, an action will lie to recover it back again. But it is otherwise where the contract was an illegal one. Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, but he has lost it by his own *folly in entering into a transaction which the law forbids. You will see [*189] instances of this in *M'Kinnell v. Robinson*, 3 M. & W. 441, *Howson v. Handcock*, 8 T. R. 575, *Browning v. Morris*, Cowp. 590, and *Lubbock v. Potts*, 4 East, 449, which is the very case I put, that of an insurance in which if the risk be not run the premium may be recovered back again, but in *Lubbock v. Potts*, the insurance was an illegal one, and it was therefore held that, though it could not have been enforced, the insured should not recover back the premium. The point is forcibly put by L. C. J. Willis, in his celebrated judgment in *Collins v. Blantern*, which I have several times cited from 2 Wilson, 341. "Whoever," says his lordship, "is a party to an unlawful contract, if he have once paid the money contracted to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul, O procul este, profani!"

To this rule, however, there are two exceptions. The first is *where the illegality is created by some statute, the object of which is to protect one class of men against another*. In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others, cannot recover money he has paid in pursuance of it, *yet a person belonging to the class to be protected may, since the allowing him to do so renders the Act more efficacious. You will see [*190] this proposition illustrated by the case of *Smith v. Bromley*, 2 Dougl. 696, note, which turned on the application of one of the old Bankrupt Acts; that Act, to prevent practices on bankrupts who had not obtained their certificates, and who for the sake of obtaining them were likely to be willing to submit to any terms, however hard, that might be imposed upon them, vacated all securities given by the bankrupt, or any one on his behalf, in consideration of the signature of the certificate.

A creditor refused to sign the certificate unless a sum of money was paid him by a friend of the bankrupt's, and the money having been paid, it was held that a person who had paid it might recover it back again: *Jacques v. Withy*, 1 H. Bl. 65; *Jacques v. Golightly*, 2 Bl. 1073; *Williams v. Hed-*

ley, 8 East, 378; Taylor v. Lendey, 9 East, 49; Smith v. Cuff, 6 M. & S. 160.

The other exception is, that when money has been paid in pursuance of an illegal contract, but paid not to the other contracting party, but to a stakeholder, then either party may recover it back again; for instance, if parties agreed to play at an illegal game, and each deposited his stake in A.'s hands, either might recover it back from A.; for it is obvious that in this [* 191] case to *allow the money to be recovered is to allow the parties a *locus penitentiae*, within which they may repent of their illegal contract, and refrain from completing it all. See Botton v. Thurland, 5 T. R. 405; Smith v. Bickmore, 4 Taunt. 474; Hastelow v. Jackson, 8 B. & C. 221; Hodson v. Terrill, 1 C. & M. 802.(a)

I have now done with the contract itself. I have stated the various points relating to the contract itself, the consideration and the effect of illegality on either. In the next lecture I shall speak of the parties to it.(b)

(a) But if the wager were not illegal, such as one on a foot race for less than 10*l*. (before the late Wager Act was past,) neither of the betters could recover back his stake from the stakeholder before the determination of the event. Emery v. Richards, 14 M. & W. 728.

(b) There are many contracts which, though legal in themselves, may be illegally authenticated, and which cannot consequently be enforced. Such are all written agreements which the law requires to be stamped, but to which no stamp, or a stamp of too low an amount has been fixed. The contract itself is not avoided, but it is incapable of being enforced, for as soon as it appears that the agreement was reduced to writing, no parol evidence of it is any longer admissible; and if the agreement be unstamped, and is produced in order that it may be set up as an agreement and to have effect given to it, it cannot be read and shall not be received in evidence at all—the jury cannot see it, the judge cannot use it. (Buxton v. Cornish, 12 M. & W. 426; Williams v. Gerry, 10 M. & W. 296.) But a copy of an original deed, not produced when called for, which copy has been compared with and sworn to, is admissible. Braythwayte v. Hitchcock, 10 M. & W. 494.) And where a deed more than thirty *years old, requiring an *ad valorem* [*192] stamp, bears the mark of having had one on it, it will be presumed to have been a proper one. (Doe d. Fryer v. Coombs, 3 Q. B. 637.) In all other cases, wherever it appears that a written instrument existed, it must be produced; but if the plaintiff can get through his case without making this appear, he cannot be nonsuited by the *defendant* producing it, even if it proves to be unstamped. (Fielder v. Ray, 6 Bing. 332.) Unstamped agreements which require to be stamped may be read in court to establish fraud or crime, and to show that it was an illegal agreement. (Coppock v. Bower, 4 M. & W. 361.) An unstamped bill of exchange is admissible upon the same principle, where it is produced to show its worthlessness. (Smart v. Nokes, 6 M. & Gr. 911.)

A distinction as to the kind of stamp required exists between deeds and other contracts. The stamps assigned to deeds are set forth in the 55 Geo. 3, c. 184, which imposes *ad valorem* stamps upon all conveyances, grants, leases, surrender of leases, bonds, assignments, mortgages, bills of sale, declarations of trust, deeds of partition, and some other specialties; it then imposes a duty of 1*l*. 15*s*. (with an increase according to length) upon all deeds not specified or expressly exempted by the schedule of the act: and questions often arise whether certain deeds fall within the category of those requiring an *ad valorem* stamp, a stamp of 1*l*. 15*s*., or of those exempted from the necessity of being stamped at all. Cases have recently occurred in which the distinction has arisen as regards Mortgage Deeds in Doe dem. Bowman v. Lewis, 13 M. & W. 241; Lant v. Pearce, 8 Ad. & Ell. 248; Wroughton v. Turtle, 11 M. & W. 561; Doe d. Jarman v. Larder, 3 B. N. C. 92; Doe d. Mercerm v. Bragg 8 Ad. & Ell. 620; Sellick v. Trevor, 11 M. & W. 722; and Harris v. Birch, 9 M. & W. 591. As regards Transfer of Mortgages, in Doe dem. Snell and Short v. Tom 4 Q. B. 615, and Brown v. Pegg, 7 Q. B. 1. As regards Conveyances, in Phillips v. Morrison, 12 M. & W. 740; Wolseley v. Cox, 2 Q. B. 321. As regards Leases, in Wilson v. Smith, 12 M. & W. 401; *Nicholls v. Cross, 14 Law Journ. Exc. 244; [*193] Eagleton v. Gulleridge, 11 M. & W. 465. As regards Bonds, in Corn Exchange of Winchester v. Gillingham, 4 Q. B. 475; Dearden v. Binns, 1 M. & Ry. 130; Frith v. Rotherham, 15 Law Journ. Exc. 133. Declarations of Trust, in Haywood v. Bibby, 11 M. & W. 812. As regards Bills of Sale, in Pierrepont v. Gower, 4 M. & Gr. 795. And Deeds of Apprenticeship, in Rex v. Chipping Norton, 5 B. & Ald. 412.

The 55 Geo. 3, c. 184, also requires that agreements (not being deeds) shall be stamped whenever "the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument; together with every schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto." The amount of the stamp was under that statute proportioned to the length of the agreement; 1*l.* being the minimum. (The 7 & 8 Vict. c. 21, has reduced this stamp to one of 2*s.* 6*d.*, for all agreements requiring a stamp under the 55 Geo. 3, c. 184.) The value applies to the subject-matter of the agreement, and not to any matter to which the agreement may collaterally relate. (Latham v. Rutley, 1 Ry. & M. 13.)

The agreement must purport to be, and actually be, one, and not a mere proposal, offer, or memorandum containing the terms of an agreement but not signed by both parties, (Bethel v. Blencowe, 3 M. & Gr. 119; Blackwell v. MacNaughton, 1 Q. B. 127; Mullett v. Hutchinson, 7 B. & Cr. 639; Hawkins v. Warre, 3 B. & Cr. 690; Wallis v. Broadbent, 4 Ad. & Ell. 877.) See also Vaughton v. Brine, 1 M. & Gr. 359, in which case Tindal, C. J., lays it down that "where a memorandum "may have been either a proposal, or an authority to enter into a contract, or a resolution that was afterwards carried into effect, and therefore only evidence of the terms of an agreement subsequently made," there no stamp is required. And Maule, J., explained the last part of the clause above cited, as follows: "The subsequent words, 'whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument,' are, I conceive, *used to exclude the excuse that the agreement, of which some memorandum is [*194] given as evidence, need not have been made in writing; which would, in every case not within the Statute of Frauds, enable a party to give in evidence a written contract without its being stamped." A prospectus or any document of which a parol agreement adopts the terms, must be stamped, according to the doctrine of Lord Ellenborough, C. J., in *Edgar v. Blick*, 1 Stark. R. 464.

Every separate contract, and every contract endorsed with fresh terms, must be separately stamped, though they relate to the same subject-matter (*Reed v. Deare*, 7 B. & Cr. 261; but where several parties join in one agreement one stamp suffices. (*Davis v. Williams*, 13 East, 232.)

The statute, it will be observed, imposes the stamp-duty only on such agreements as relate to matters of the value of 20*l.* and upwards: this applies to the immediate subject matter of the contract, as, for instance, an agreement to carry goods will be governed not by the value of the goods, but by the charge for carrying. (Latham v. Rutley, *supra*; and see *Hill v. Ramm*, 5 M. & Gr. 789.) So, agreements to warehouse goods for rent, depend not on the value of the goods deposited, but the matter of the agreement, which is the rent. (*Baldwin v. Alsager*, 13 M. & W. 365.) Nor is it enough to bring a case within the statute that the agreement may possibly be of the value of 20*l.*; it must be so in its nature and inception. Thus no stamp is required on an I O U which promises to pay interest at 5 per cent. on 45*l.* (*Melanotte v. Teasdale*, 13 M. & W. 216.) Nor is any stamp requisite where the value of the subject-matter is uncertain, as in the case of a guarantee to indemnify another against the unknown results of some act. (*Cox v. Bailey*, 6 M. & Gr. 193.)

The schedule to 7 & 8 Vict. c. 21, imposes a duty of 2*s.* 6*d.* "for and in respect of every agreement or minute or memorandum of an agreement now chargeable with the duty of 1*l.* under the head or title of 'Agreement' in the schedule to the act of 55 G. 3, c. 184, annexed."

If the stamp is of sufficient value, though a wrong one, it is valid. See 10th Section *of the 55 Geo. 3, c. 184.) Wherever there has been a material alteration in an [*195] agreement after stamping, it must be restamped. Agreements may be stamped at any time before they are produced at the trial, and 7 & 8 Vict. 21, s. 5, provides that this may be done within fourteen days after the making thereof, without any penalty: but if after that period, then on payment of 10*l.* penalty above the amount of the stamp.

The act provides that where "divers letters shall be offered in evidence to prove one agreement between the party who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped." And the case of *Grant v. Maddox*, 15 Law Journ. Ex. 104, decides that this proviso applies to letters written by the agents as well as by the parties themselves.

Letters to an attorney, which merely authorise a party to put his name to bills of exchange, are not liable to the agreement stamp, but fall under the provision in the act for powers of attorney, though they contain an agreement for liability, provided it be only such an agreement as the law would imply from the authority given. (See 7 & 8 Vict. c. 21, s. 6; also *Reg. v. Kolk*, 12 Ad. & Ell. 559; *Walker v. Remmett*, 15 Law Journ., C. P. 174.)

Where an agreement contract is accompanied with a deposit of title deeds for making a mortgage, wadset, or other security on any estate or property therein comprised, the

schedule, Part I., requires an agreement stamp. See *Pyle v. Partridge*, 15 Law Journ., Exc. 129, as to what is not an accompaniment of the agreement with a deposit of the title-deeds.

All agreements requiring a stamp must relate to money; but all relating to money (even above 20*l.*) do not require a stamp; for there are many exemptions.

In the first place, the 55 of Geo. 3, c. 184, itself exempts from stamp duty any *memorandum or agreement for granting a lease or tack at rack-rent of any messuage, land, or tenement, under the yearly rent of 5*l.**

It has been decided that this clause applies to agreements where the amount of rent is [*196] under 5*l.*, whether the subject of the agreement be above that value or not. And it has been held, moreover, in the same case, that all agreements for leases are equally exempt from duty of which the rental is under 20*l.*, according to the above-cited clause of the schedule, wherever the "*matter of the agreement*" is not the land, but the amount of rent. (*Doe d. Marlow v. Wiggins*, 4 Q. B. per Patteson, J. 376.) The question is, what do the parties deal for? If merely for what the tenant is to give for the right of a specified occupation, the agreement requires no stamp, unless that amount be 20*l.* or upwards: if it be an agreement for a *lease of the land or tenement itself*, then it is exempted from stamp-duty only where the yearly rent is under 5*l.*

The act exempts any agreement "*made for or relating to the sale of any goods, wares, or merchandise*," which is not under seal. If such agreement is under seal it falls under the requirements of deeds, and must be stamped accordingly.

This is the most important exemption. It involves the distinction between things relating to the land and *fructus industriales*, which we have already treated of. (See p. 61, note a.) The former requiring a stamp, the latter being exempted within the exemption which in all cases applies only to what are goods and chattels: fixtures are not. (*Chanter v. Dickinson*, 5 M. & Gr. 253.)

The agreements within this exemption must have for their primary effect either the sale of goods or something that relates to their sale (*Chanter v. Dickinson*, *supra*): if so, it is immaterial if there be minor or collateral stipulations. But where the primary object of the agreement is a pledge, and a sale the ulterior or contingent condition, a stamp is required. (*Smith v. Cator*, 2 B. & Ald. 778.) And where some other term in the agreement is a primary co-ordinate object, and does not relate to a sale, the agreement must be stamped, for it is something more than a mere contract for the sale of goods: thus a sale of goods and a *goodwill* is not exempt. (*South v. Finch*, 3 Bing. N. C. 506.) But warranties contained in receipt fall within this exemption, for they relate to the sale. [*197] (*Skrine v. Elmore*, 2 Camp. 406.) So do agreements to share in purchases. (*Marson v. Short*, 2 Bing. N. C. 118.) Guarantees for the payment of goods are within the exemption. (*Warrington v. Furber*, 8 East, 242; *Martin v. Wright*, 14 Law Journ. Q. B. 142.) It also exempts all letters containing any agreement, not previously exempted, in respect of any merchandize or evidence of such, *which shall pass by the post* between merchants or other persons carrying on trade or commerce in Great Britain residing and actually being fifty miles distant from each other at the time of sending such letters.

The 9 Geo. 4, c. 14, exempts also all contracts for work to be done and materials to be provided in manufacturing goods.

The 55 Geo. 3, c. 184, exempts any agreement for the hire of labourers, artificers, or servants. It exempts all agreements between the master and mariners of any vessel for wages between English ports. (See, on the subject of contracts between them, 8 & 9 Vict. c. 116.)

In addition to these exemptions, the 9 Geo. 4, c. 14, s. 8, which extended the requirements of the Statute of Frauds, that agreements be in writing, has provided that "no memorandum or other writing made necessary by that act shall be deemed to be an agreement, within the meaning of any statute relating to the duties of stamps." These agreements thus exempted relate to the ratification of contracts by infants and contracts barred by the Statute of Limitations; to assurances of credit, and to contracts for works to be done and materials to be provided in manufacturing goods.

Thus, including all the agreements under 20*l.*, all those relating to sales, leases of small tenements, the hire of servants, and those last enumerated under the 9 Geo. 4, c. 14, it will be seen that a very large proportion of the most ordinary agreements are exempted from the necessity of being stamped.

Receipt stamps will be noticed in treating of the defences to actions on contracts.

All inland bills of exchange, drafts, orders, and promissory notes, do not fall within our province; but it may be briefly stated that they also are stamped under the schedule of [*198] the 55 Geo. 3, c. 184, *according to the well-known rates of duty, wherever they are for a sum certain, and are made payable to the bearer or to order, or be delivered to the payee or some one on his behalf. This is the definition of a bill or note under the

act. There is a special exemption for cheques on bankers transacting business within fifteen miles (according to 9 Geo. 4, c. 49, s. 15) of the place where they are issued, provided they are dated on or before the day on which they are issued, and specify the place where they are drawn. (*Field v. Wood*, 7 Ad. & Ell. 114; *Dawson v. MacDonald*, 2 M. & W. 26.)

Promissory notes, which contain an agreement or terms amounting to one, are to be stamped as notes only if the entire sum or sums secured by them are *definite and certain*; otherwise as agreements, if of the proper value. (See instances in *Bolton v. Dugdale*, 4 B. & Adol. 620; *Davies v. Wilkinson*, 10 Ad. & Ell. 100.)

Where the payment is contingent, as for goods ordered to be paid only if delivered, it is an agreement, and not a note. (*Jarvis v. Wilkins*, 7 M. & W. 412.)

The subject of stamps on bills and notes is fully treated of in *Serjeant Byle's Practical Treatise on Bills*, p. 74, 4th edit.

*LECTURE VIII.

[*199]

PARTIES TO CONTRACTS.—WHO ARE INCOMPETENT TO CONTRACT.—INFANTS.
—WIVES.

I CONCLUDED in my last lecture the consideration of the contract itself, having spoken of the different sorts of contract, of the consideration necessary to support a contract without specialty, and the effect of illegality in invalidating all contracts whatever. The next branch of the subject relates to the *parties to the contract*.(a) Now this, you will at once perceive, involves a double consideration.

First, Regarding the *ability* of the parties to the contract to contract at all.

Secondly, Regarding their ability to enter into this or that particular sort of contract; for, (as I shall have to explain more at length to you) there are persons who are allowed by the law to contract, but are not allowed to contract in the **same way* as an ordinary individual; for instance, a corporation may contract *by deed*, but cannot, except in certain cases [*200] which I shall presently specify, contract in any other manner. However, although these two considerations are in themselves distinct, yet I think the better and more intelligible plan will be to deal with both of them together, specifying, one by one, those classes of persons regarding whose power to contract, the law contains any particular provisions, and, pointing out, while treating upon each of them, in what cases they are disabled from entering into any contract, and in what cases, although allowed to contract, they are obliged to do so in a particular form.

Now I need hardly tell you that, *prima facie*, any subject of the realm has power to enter into any contract not rendered illegal by the provisions of a statute or a common law; and therefore the cases to which I am now to advert are cases of complete or partial *disability*; cases in which a con-

(a) Parties to a contract are they between whom privity or mutuality of contract exists, see ante, p. 89, note. Questions often arise as to the person to whom credit is given; and who is said to be *privity* to it; in other words a party to it. Privity and mutuality as we have seen, are essential to make people parties to a contract. This privity or mutuality may be either direct or implied. It is direct when two persons contract together without the intervention of others; implied, where they contract by means of their agents, as we shall presently see.

tract, which would have been good if entered into by an ordinary individual, is, when entered into by some particular individual, invalid, because that individual happens to fall within a class of persons who either do not possess *ability* to contract at all, or do not possess ability to contract in that particular way.

The first of these classes of persons to which I shall advert is that of *Infants*.

The general principle which regulates this branch of the law is, that [201] until an individual has attained the age of twenty-one, which period the law has selected as that at which a person of average capacity may fairly be supposed to have attained a sufficient experience to render his natural faculties fully available in the practical business of the world, it is necessary to shield him from the dangers of becoming a prey to others willing to take advantage of his inexperience; and as there are no means of doing this except by placing him under a limited disability to contract, he is accordingly placed under such limited disability. But, inasmuch as to place him under a *total* disability might have the effect of preventing him from attaining objects not only not detrimental, but of the utmost advantage to him, he is, in order to avoid this risk, permitted to oblige himself to a certain extent, since otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all.

The general principle therefore is, that an infant may bind himself by a contract for what the law considers *necessaries*, but not by any other contract. We will consider, therefore, what it is that the law comprises under this denomination.

Now, it is well established by the decisions that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's [202] degree, and all those accommodations, conveniences, and even matters of taste which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. The question *what* is conformable, *what* is, in the legal sense of the word, *necessary*, is, in each case, to be decided by a jury; but these are the principles on which the judge ought to direct the jury that their decision should in each particular case be guided. It is impossible to understand this subject practically, so as to be able to say with tolerable certainty what would be the decision on this or that particular case, except by a familiarity with similar ones. I will therefore refer you to a number of decided cases, containing, in my judgment, the best illustrations of the matter. See *Burghart v. Hall*, 4 M. & W. 727, *Peters v. Flemyng*, 6 M. & W. 42, *Hands v. Slaney*, 8 T. R. 578, *Coates v. Wilson*, 5 Esp. 152, *Harrison v. Fane*, 1 M. & G. 550.

The two cases of *Peters v. Flemyng*, 6 M. & W. 42, and *Harrison v. Fane*, 1 M. & G. 550, in one of which the infant was held liable, and in the other not, appear to me to furnish good examples of the distinctions of which I am speaking.

In *Peters v. Flemyng*, the plaintiff, who was a jeweller, brought an action of assumpsit against an infant, who pleaded his infancy by way of defence: the plaintiff replied that the goods, for the price of which he sued, were

necessaries suitable to the estate, degree and condition in life of the infant, on which issue was joined, and the *question tried was, whether they were or were not so. It turned out that the infant was the [*203] eldest son of a member of Parliament, who was, also, a gentleman of fortune, and that the infant was an undergraduate of the University of Cambridge, and resided at the University. The articles supplied, were four rings, a gold watch chain, and a pair of breast pins. The jury found that these articles were necessaries, and a motion was made to set aside the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere. Baron Parke said,

"It is perfectly clear that, from the earliest time down to the present, the word *necessaries* was not confined to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is; and therefore, we must not take the word '*necessaries*' in its unqualified sense, but with the qualification above pointed out. The question therefore is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, namely, the breast-pin and the watch-chain. The former might be a matter either of necessity or of ornament. The usefulness of the other might depend on this, whether the watch was necessary? If it was, then the chain might become necessary itself. Now, it is impossible that a judge could withdraw from the consideration of a jury whether a watch was necessary for a young man at college, and of the age of eighteen or nineteen to have? That being so, it is equally, as far as the chain is concerned, a question for the jury. There was therefore evidence to go to the jury. The true rule I take to be this, that all such articles as are *purely* ornamental are not necessary, and are to be rejected, because they can not be requisite for any one, and for such matters therefore an infant cannot *be made responsible. But if they were not strictly of this description, then the question arises, [*204] whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were, for such articles the infant may be made responsible."

*On the other hand, in *Harrison v. Fane*, 1 Mann. & Gr. 550, *α*, [*204] an action was brought by a livery stable keeper for the hire of horses, the defendant pleaded infancy, and the plaintiff replied that the horses furnished were necessary for the infant, upon which issue was joined. It turned out on the trial that the defendant was the younger son of a gentleman who had once been a member of Parliament, and who had a family of five children. The defendant, the infant, kept a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances, the judge who tried the cause thought that the horses were not necessaries, (a) *and directed the jury accordingly; but the jury thought proper, nevertheless, [*205] to find their verdict for the plaintiff. The Court, considering it a perverse one, and contrary to law, set it aside, the L. C. J. saying that he would not say that horses could not be necessaries under any circumstances, but that no evidence was given that they were so in the present case. With regard to the L. C. Justice's remark, I feel no difficulty in putting a case in which

(a) So in *Brooker v. Scott*, 11 M. & W. 67. Soda water, oranges, and jellies, for an infant undergraduate at college, were held, *prima facie*, not to be necessaries, though they might have been shown to have been so. It is impossible not to perceive that these things are as suitable to the condition of a gownsman as a gold watch-chain, and in all probability quite as necessary as the gold breast-pin of Mr. Fleming; but a remark made by Mr. Baron Parke shows that there was another reason for the decision in *Brooker v. Scott*. "This is the case of a young man resident in the town, and having from his college every thing necessary for a person *in statu pupillari*." But nevertheless the rule must be deemed to be somewhat narrowed in the latter case.

a horse might be considered necessary. Suppose, for instance, the infant were a young man in a genteel station of life, and had been ordered horse exercise by a medical attendant.(a)

(a) Coke says, "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards," Co. Litt. 172 a. This doctrine was somewhat narrowed in a judgment of Haughton, J., 2 Roll. R. 271. "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant; for no contracts are binding on infants, except such as concern their person." And this rule as to what is a personal necessary has been since recognised. And it had also been held that what is necessary for an infant's wife is necessary for himself. *Turner v. Trusley*, 1 Str. 168. Contracts by infants for things necessary for their children, bind them on maxim of "*Persona conjuncta æquiparatur interesse proprio*." *Bac. Max. 67, Ed. 1639*.

This doctrine derived a new extension in the late case of *Chapple v. Cooper*, 13 M. & W. 252. An infant widow was sued for the expenses of her husband's funeral, and was held liable. The reasoning by which the Court of Exchequer arrived at this conclusion is very instructive, and as the judgment delivered by Baron Alderson is a terse thesis on the whole law of contracts by infants, it will form a fitting summary of Mr. Smith's remarks, and a useful code for future reference. "It seems clear that an infant can contract so as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the contract is, at the time he makes it, plainly and unequivocally for his benefit. It is with the former class that we are concerned. Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art, or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself. It is manifest, we think, that this principle alone would not be sufficient to decide the present case. For it would be difficult to say that there is any personal advantage necessarily derived to an infant from the mere burial of a deceased person. But there is another consideration which arises out of the circumstances of this case, which may, we think, materially affect the defendant's liability. This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now, the law permits an infant to make a valid contract of marriage; and all necessities furnished to those with whom he becomes one person by or through the contract of marriage, are, in point of law, necessities to the infant himself. Thus, a contract for necessities to an infant's wife and lawful children is used by Lord Bacon as one of the illustrations of the maxim, '*Persona conjuncta æquiparatur interesse proprio*.' (*Bac. Law Maxims*, p. 86.) 'If a man,' says Lord Bacon, 'under the years of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or education.' Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule, to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent Christian burial of his wife and lawful children, who are the persons conjunctæ with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of

*There are, however, some species of contracts which the law considers it so imprudent on the*part of an infant to enter [*206-*207] into, that it will not allow him to bind himself by them under any *circumstances. For instance, an infant cannot *trade*, and, consequently, cannot bind himself by any contract having relation to trade. [*208] We know, by constant experience, that infants *do*, in fact, trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of 21 *can possibly have [*209] discretion enough for that purpose. You will see this laid down as a general rule in *Whywell v. Champion*, Str. 1083; *Dilk v. Keightly*, 2 Esp. 480; *Goode v. Harrison*, 5 B. & Ald. 147; and *Warwick v. Bruce*, 2 M. & S. 205. Some singular consequences follow from this general rule: for instance, a bill of exchange is a mercantile contract deriving, as I had occasion to explain in the last Lecture, its peculiar and distinguishing qualities from the law merchant. An infant, therefore, as *he* cannot be a merchant, in the eye of the law, is not allowed to bind himself by becoming a party to such an instrument; and thus, although a young man under the age of 21 may bind himself by a contract to pay money for his necessary dress, living or education, yet, if he accept a bill for the price of these very articles, it will not bind him; although by accepting the bill he, in fact, would rather gain an advantage, inasmuch as he would be entitled to credit during the time the bill had to run. *Williams v. Harrison*, Carth. 160; *Williams v. Watts*, 1 Camp. 552.

Again, he cannot bind himself by stating an account; for the law presumes that he has not sufficient capacity to reckon; and that although the items of the account be all recoverable against him as for necessaries.(a)

marriage. If this be correct, then an infant husband, or parent, may contract for the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so.

"In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is as a contract for his own personal benefit; and if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy is, for the above reasons, no defence, if the contract be for her personal benefit.

"It may be observed, that as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative."

(a) It is doubtful if this be longer so. In *Williams v. Moor*, 11 M. & W. 256, Mr. Baron Parke, in giving the considered judgment of the Court, said, speaking of the ratification of such a contract, "We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract. The contract of an infant for goods sold and delivered (not being necessaries) is as completely void as his contract on an account stated, if by the word void is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract as well as on the other." Although this decision, turned upon the ratification of the contract after the infant came of age, and is not a direct decision that an account stated for necessaries may be maintained against an infant, nevertheless the doctrine laid down is broad enough to support that conclusion, and certainly puts contracts for goods and on the account stated on the same footing. It may be doubted, therefore, whether the spirit of this judgment, combined with the progress of modern education, may not prevail over the somewhat antique hypothesis, that no one under twenty-one years old has capacity to reckon.

[*210] **Trueman v. Hurst*, 1 T. R. 40; *Ingledew v. Douglas*, 2 Stark. 36; *Oliver v. Woodroffe*, 4 M. & W. 650.

This rule that an infant shall not be allowed to bind himself by contracts made in trade, although looking at it with regard to the present state of education and society, it may appear somewhat unreasonable in its operation, yet, looking at it upon general principles, it is capable of being defended by some strong arguments. The consequences of failure in trade are so fatal, not merely to the property, but often to the reputation of the unsuccessful trader. A failing trader is so often, in his struggles to save himself from utter shipwreck, and to keep up a good *appearance in the sight of the world, induced to have recourse to disingenuous and reprehensible expedients, that possibly, upon reflection, it may be thought not unwise to guard young persons up to a certain point against the accidents and temptations of mercantile speculation, and to ensure to them, as far as possible, the advantages of starting fair in life with fortunes unimpaired and characters unblemished. How grievous would be the situation of a young person beginning life at one-and-twenty an uncertificated bankrupt. Now, against such a chance, the law as it now stands effectually guards him; for, as an infant cannot trade, he cannot become bankrupt; and it has been decided that a fiat against him is void, *Belton v. Hodges*, 9 Bing. 365. Again, the general principle being that an infant shall be bound by no contract which is not beneficial to him, it is held that he can engage in none in which the performance of the contract is secured by a penalty; for that it cannot be for his advantage to become subject to a penalty; and, therefore, though the old books lay it down that he may bind himself by a deed to pay for necessities,^(a) yet it is clearly settled that he cannot do so by a bond containing a penalty. *Ayliff v. Archdale*, Cro. Eliz. 920; *Corpe v. Overton*, 10 Bing. 252. A variety of other examples might be given; but I think what I have said *sufficient to explain [*212] the general nature of an infant's liability and exemption from liability.

Now, therefore, the general rule being that an infant cannot bind himself except for necessities, next comes the question—Suppose he do, in fact, enter into a contract for something not falling under that denomination, what will be the consequence? In the first place, no action can be maintained against him during his infancy upon any such contract, nor afterwards, unless he elect to confirm it. But, in the second place, the contract is not absolutely void but voidable;^(b) and, therefore, when he arrives at the age of twenty-one, he may confirm it, and, if he do so, he will become liable to an action upon it.

I will exemplify this by the case of *Goode v. Harrison*, which I have already cited from 5 B. & A. 147. A person of the name of Goode entered into a trading partnership with an infant under the age of twenty-one, called Bennion; a third person, named Harrison, supplied them with

(a) See *Cockshott v. Bennett*, 2 T. R. 766, per Ashurst, J.; *S. P. Tapper v. Davenport*, Bull. N. P. 155.

(b) In *Thornton v. Illingworth*, 2 B. & Cr. 824, Bayley, J. says, that, "in the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only;" and Littleton, J., says the same. Parke, B., however, in *Williams v. Moor*, (*supra*) holds that the promise is not void in any case, unless the infant chooses to plead his infancy. See the next note, p. 214.

goods, and after Bennion came of age, he took no step to signify to the world that he disclaimed the connexion with Goode, but, on the contrary, allowed it to be supposed that he was *still in partnership with him. After this, Harrison supplied Goode with more articles, and brought [*213] an action against him for the price, jointly with Bennion, as a co-defendant. Bennion set up his infancy, and urged that, as an infant cannot bind himself by a contract made in the course of trade, his agreement, while under age, to become Goode's partner was not binding upon him, and consequently, that, not being Goode's partner, he was not liable for the articles supplied to him. On the other hand, it was urged that admitting the partnership contracted while he was an infant to be voidable, it was nevertheless in his option, when he arrived at his full age of one-and-twenty, to adopt and confirm it: that by his conduct he had done so; and that consequently he was liable for the goods supplied afterwards. The question was argued, as you may suppose, with great ability, the counsel being Baron Parke and the late Mr. Justice Littledale. The court decided in favour of the plaintiff. The principle is clearly and strictly laid down in the judgment of Mr. Justice Bayley—

"It is clear," said his lordship, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect, whether he will continue that partnership or not. If he continues the partnership, he will then be liable as partner. If he dissolve the partnership, and, if when of age, he take the proper means *to let the world know that the partnership is dissolved, then he will [*214] cease to be a partner."

It is easy to apply this mode of reasoning to any other sort of contract, see also *Southerton v. Whitelock*, 1 Str. 690. However, in order to prevent persons from inconsiderately confirming contracts made by them during infancy, and to obviate the danger of attempts to foist such confirmation on them by false evidence, it is enacted by 9 Geo. 4, c. 14, s. 5, that no action shall be maintained whereby to charge any person upon any promise made, after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made, by some *writing*, signed by the party to be charged therewith. See for a decision on this Act, *Hartley v. Wharton*, 11 Ad. & E. 934.(a)

(a) In the cases where, as we have seen, it has been questioned, whether contracts by infants were not void *ab initio*, it has also been held that they were consequently incapable of ratification. In *Williams v. Moor*, 11 M. & W. 256, the point was raised, whether a contract on the account stated was not void, and the subsequent ratification therefore was of no avail; but the Court of Exchequer held, as before stated, that there was just the same reason why an infant coming of age should be allowed to confirm an account stated, as to make himself liable on any other contract which he might have entered into during his infancy. Mr. Baron Parke, moreover, held as we have seen, that the promise is not void in any case; and this is certainly now the prevailing opinion.

The ratification sets up and gives validity to an otherwise invalid contract; it "removes the bar of infancy;" it is not therefore of the nature of a new contract; for the only consideration is the moral duty arising from the previous transaction; and that is no consideration at all; (*Jennings v. Brown*, 9 M. & W. 501, per Parke, B.;) but it gives legal effect to the original obligation, and to all its concomitants. The question of consideration therefore does not arise on the ratification, but relates to that of the old contract, upon which the plaintiff should declare, and not upon its revival, according at least to the form of pleading in *Cohen v. Armstrong*, 1 M. & Sel. 724; *Thornton v. Illingworth*, 2 B.

Now then, such being the effect of an infant's *contract with regard to the infant himself, it remains only to say a word or two as to their *effect on the other contracting party. And, as to him, [*216] the rule is, *that he is bound, though the infant is not*; for, to use the words in which the rule is stated in Bacon's Ab., Infancy, I. 4,—“Infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for, being an indulgence which the law allows infants to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege instead of being an advantage to the infant, would, in many cases turn greatly to his detriment. Thus, for instance, in *Holt v. Ward*, 2 Strange, 937, a gentleman of full age had promised to marry a minor. It was decided that she might maintain an action against him for breach of promise, though he could not have done so had she refused to perform her side of the contract. Again, in *Warwick v. Bruce*, 2 M. & S. 205, an infant was allowed to maintain an action on a contract to purchase a crop, on which no action could have been maintained against him.

I now come to the second class of persons on whose capacity to contract I think it necessary to observe. I mean that of *married women*.

Now, a contract by, or with a married woman, *is one of two sorts. [*217] It is either a contract which she entered into *before* her marriage, and which continued in existence afterwards; or, it is a contract which she entered into subsequently to her marriage.

Now, with regard to the former description of contracts, I will dispose of them in a few words. Upon the marriage, the benefit of, and the liability to, the wife's contract made before marriage, vest in the husband, and continue vested in him during the continuance of the marriage. If she die before they are enforced, and he survives her, he is entitled to the benefit of such contracts; not in his own right, but as her administrator, and liable to be sued on them; not in his individual capacity, but as his wife's administrator. If she survives him, her right to the benefit of and liability upon, such contracts revives, assuming always that nothing has been done to put an end to the contract during the continuance of the marriage. (See for these

& Cr. 824; and *Hartley v. Wharton*. It is not easy to see how the want of consideration for the new promise could be otherwise got over in the face of *Monckman v. Shepherdson*, 11 Ad. & Ell. 415, which decided that a good consideration once forfeited could not be revived by a parol promise founded upon a moral obligation. There is nothing in the terms of the statute to supply the want of consideration; or at all to help the action; it simply requires that evidence of the ratification shall be in writing. The case of an acknowledgment to take a debt out of the Statute of Limitations appears in this respect analogous; in that case the plaintiff declares not on the acknowledgment, but on the original contract; see *Leaper v. Tatton*, 16 East, 420. If this be a correct view of the case where the defendant pleads infancy, the plaintiff, instead of a new assignment, replies the ratification, as in *Hartley v. Wharton*, 11 A. & E. 934, and *Cohen v. Armstrong*. It has been held that where the infant has given a bond, it cannot be ratified by the usual memorandum, so as to give a right of action upon it; for an instrument under seal can only be confirmed by one of as high a nature. *Baylis v. Dyneley*, 3 M. & Sel. 477. See as to the evidence of the ratification, p. 79, ante.

points *Ramsey v. George*, 1 M. & S. 180, *Betts v. Kimpton*, 2 B. & A. 273, *Mitchison v. Hewson*, 7 T. R. 350, *Com. Dig., Tit. Baron and Feme, N.*(a)

*During the marriage the husband may, as I have said, sue or be sued upon his wife's contracts, made while she was a single woman; [*218] but if he sue he must join her as a co-plaintiff; and, if he be sued, she must be joined as a co-defendant. *Ramsey v. George*, 1 M. & S. 180, *Milner v. Milner*, 3 T. R. 631, *Pittam v. Foster*, 1 B. & C. 248.

Such is shortly the state of the law regarding *the effect of marriage on the contracts made by the wife while single. There is [*219] one case, indeed, in which the husband may sue upon a contract made with her while single without joining her as a co-plaintiff. This is where a bill of exchange or promissory note has been given to her; in which case it has been decided that the marriage operates as an endorsement of it to the husband, and that he can sue alone upon it. *McNeilage v. Holloway*, 1 B. & A. 218.(b)

Next as to contracts entered into by a married woman subsequently to her marriage. It is a general rule that a married woman cannot bind herself by any contract made during the coverture; not as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being in contemplation of law, but one person. The great case on this subject is *Marshall v. Rutton*, 8 T. R. 545, which was decided by all the judges in England, except Mr. Buller, and is one of the last, perhaps the very last instance of the practice which was so common in the early *ages of the law, and according to which any one of the superior courts before which a very important point arose, requested [*220] the assistance of the judges of the other two to hear it discussed, and to assist in deciding it. (See also *Lewis v. Lee*, 3 B. & C. 291, *Faithorne v. Blaquire*, 6 M. & S. 73.) In a word, the person who contracts with a married woman, as far as any right in a court of law is concerned, relies

(a) A new feature arose in the later case of *Sherrington v. Yates*, 12 M. & W. 855, where the assignees of a bankrupt brought an action in their own names on a promissory note made to the wife of the bankrupt *dum sola*. The case was carried to the Exchequer Chamber, and it was then adjudged (after declaring the exact doctrine expressed above by Mr. Smith, to the effect that choses in action, of which a promissory note is one, not reduced into possession, survive to the wife) that the assignees of the husband, by bringing the action in their names alone, have deprived the wife of this possible benefit; for, as she is not a party to this record, she cannot make any suggestion upon it, or entitle herself to any advantage upon her husband's death. And as the assignment in bankruptcy has not the effect of reducing into possession a chose in action belonging to the wife, so as to destroy her rights of survivorship; (*Mitford v. Mitford*, 6 M. & W. 423;) and again, as the Bankrupt Laws do not profess to vest any property in the assignees other than that which was the property of the bankrupt himself, the case of reputed ownership excepted, it would follow that the assignees cannot deprive the wife of any interest which she has in a chose in action, nor of any contingent benefit or advantage which might accrue to her in the endeavour to reduce such chose in action into actual possession. Upon principle, therefore, we think that no more passes to the assignees than the husband himself had; and if he had no right by law to sue alone, without joining the wife, so neither would the assignees. The Vice Chancellor of England, it appears, in the case of *Pierce v. Thorneley*, 2 Sim. 167, has expressly stated that the action should be brought in this case in the joint names of the assignees and the wife.

(b) Selwyn lays it down broadly that in an action on a bond given to the wife *dum sola*, husband and wife *must* join. And in a note prudently remarks, "Until the doubts which hang over this question are removed by a solemn adjudication, the best way of proceeding for the recovery of a chose in action of the wife *dum sola*, is to bring the action in the names of husband and wife; on the propriety of which method a question cannot be raised." (1 Sel. Nisi Prius, 308, note, where the old cases will be found collected.)

upon her bare word ; for she is not recognised there as a person capable of binding herself by any contract whatever, save only in one or two excepted cases which I will now specify.

The first of these is where her husband is civilly dead : for instance, where he is under sentence of transportation. In such a case, to prevent her from contracting would be to deprive her too of all civil rights, since, the husband being civilly dead, is no longer capable of contracting for her. (See *ex parte Franks*, 7 Bing. 762 ; *Marsh v. Hutchinson*, 2 B. & P. 231.) This is a very old doctrine, having been first established in the 2d Hen. 4. In the Year Book of which year we find that Belknap the Lord High Treasurer was banished to Gascony till he should obtain the King's favour, and his wife, Lady Belknap, brought an action in the Common Pleas, which seems to have been the first instance of such a proceeding by a married woman ; for it struck the lawyers of those days with so much surprise that [*221] they commemorated *it by a Latin distich, which Lord Coke has thought it worth his while to preserve in the 1st Institute. It is in the old monkish style, and is not only in Hexameter measure, but in rhyme also, the words are

‘ Ecce modo mirum, quod fœminâ fert breve Regis,
Non nominando virum conjunctum robore legis.”

Another case is where the husband is a foreigner, belonging to a country at war with Great Britain. In such case as he cannot lawfully contract or sue in England, it seems to be admitted that his wife may do so as if she were unmarried. See *Barden v. Keverberg*, 2 Mee. & W. 65.

By the custom of the city of London, a married woman is allowed to be a trader in her individual capacity, and may sue alone in the city courts on contracts made by her in the course of such trade ; but it would seem that even in this case, if she were to bring an action in the courts at Westminster, it would be necessary to make her husband a party to it. This subject is learnedly discussed in *Beard v. Webb*, 2 B. & P. 93.

Now, so far with regard to a married woman's right to bind herself by contracts. But with regard to her power of taking advantage of contracts made by other persons with her, the rule is somewhat different ; for, it has been decided that, if a contract be made with the wife on good consideration during the marriage, the *husband may, if he please, take [*222] advantage of it, and recover in an action on it, in which action he may join his wife as a co-plaintiff. And if he die without taking any such step, the right to sue upon it will survive to the wife. One of the earliest authorities on this subject is *Brashford v. Buckingham*, Cro. Jac. 77, where the wife had undertaken to cure a wound for the sum of ten pounds, which the patient was ungrateful enough not to pay, and after she and her husband had recovered judgment in an action of debt, a writ of error was brought in the Exchequer Chamber on the ground that the married woman could not sue. But the court said that being grounded on a promise made to the wife upon a matter arising upon her skill, and on a performance to be made to the wife, she is the cause of the action, and so the action brought in both their names is well enough, and such action shall survive to the wife. Wherefore the judgment was affirmed. On the same principle, if a bond

be made payable to her, she and her husband may sue upon it. *Day v. Padrone*, 2 M. & S. 396 note.(a) So if a promissory note be *payable to her. *Philliskirk v. Pluckwell*, 2 M. & S. 393. And there [*223] is a very curious case of *Richards v. Richards*, 2 B. & Adol. 447, in which a married woman took a note from her own husband and two other persons. And it was held, that though no one could have sued on it in his lifetime, yet, that, after his death, she might sue the two surviving makers; and that decision is approved of in *Gaters v. Madeley*, 6 Mee. & W. 423, which is, I believe, the last case on the subject. In that case a promissory note was given to a married woman during the coverture. She survived her husband, and having, afterwards, herself died before the note was paid: It was held, that her executor was entitled to maintain an action upon it. The rule is very clearly laid down in the judgment of Baron Parke.

"This," said his lordship, "is an action on a promissory note—an instrument on which no one can sue unless he was originally a party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a *chose in action* of a peculiar nature. It has, indeed, been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange. Still, it is a *chose in action*, and nothing more. When a *chose in action*, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife *have the benefit of it; or, if he thinks [*224] proper, he may take it himself; and if, in this case, the husband had, in his life, time brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is: and, in that case, the remedy on it survives to the wife: or he may adopt another course, and join her name with his own, and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her."(b)

(a) Upon a deed *inter partes*, made during coverture, the effect of the authorities seems to be that, *prima facie*, the right of action on the covenant belongs to the wife, and would survive to her on the death of the husband, without his having reduced it into possession, by dissenting from her right in some operative way, as by taking a new security, so as to vest the interest in himself. Therefore, the coverture of the plaintiff in such a case cannot be pleaded in bar, and in an action brought by the plaintiff, the non-joinder of the husband can be pleaded only in abatement. (*Bendix v. Wakeman*, 12 M. & W. 97.)

(b) Though it is settled law that a promissory note, given to the wife during coverture is a *chose in action*, and not a personal chattel vested in the husband, and that upon his death the right to sue on it survives to the widow, unless the husband has reduced it into possession, it is still a point of nicety and difficulty to determine what is a reducing into possession by the husband, so as to deprive the wife of her subsequent remedy. In the recent case of *Hart v. Stevens*, 14 Law Journ., Q. B. 148, it seems to have been assumed that receiving money on it, or bringing an action for it, are alone sufficient reductions into possession: a doctrine apparently sanctioned by that of Lord Kenyon, C. J., in *Milner v. Milner*, 3 T. R. 631, and by Lord Hardwicke in *Garforth v. Bradley*, 2 Ves. Sen. 675, who puts it, on the ground of dissent to the interest remaining in the wife, thereby evidenced on the part of the husband. In the still later case of *Scarpellini v. Atcheon*, 14 Law Journ. Q. B. 333, a case which presents some noticeable features, the plaintiff was a widow, and the payee of a promissory note made to her during coverture by the defendant. The husband caused the wife, as the plea stated, "in his marital right," to indorse to F., who after his death delivered it to the wife, who then brought this action upon it. The court embodied, without dissent, the doctrine we have just stated in the judgment, and held that the facts as stated did not amount to a reduction into possession by the husband, and that "this at least is certain, that something precise and specific should be stated from which the court may reasonably infer that disagreement of interest in the wife mentioned by Lord Hardwicke as an extinguishment of her rights. It was also held that, although no value appeared for the delivery to Forbes, yet that the statement is of a gift to him, and that that would equally amount to the husband's disagreement to the interest in the wife.

As to what amounts to a reduction into possession, see further instances in *Burnham v.*

[*225] *Here you see all the possible cases are put, and the consequence of each pointed out, which makes this judgment a very useful one for the purpose of practical reference.

Having thus disposed of the considerations arising on contracts made with or by infants and married women, I will postpone the conclusion of this branch of the subject till the next lecture.

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*LECTURE IX.

PARTIES TO CONTRACTS.—INSANE PERSONS.—INTOXICATED PERSONS.—ALIENS.—CORPORATIONS.—THE MODE IN WHICH COMPETENT PERSONS CONTRACT.—AGENTS.—PARTNERS.—PUBLIC COMPANIES.

PURSUING the inquiry upon which I entered in the last lecture with regard to the competency of the parties to *Contracts*, and having disposed of the cases of *Infancy* and *Coverture*, the next in order is that of persons of *non-sane* mind, whose disability arises, not, as in the two former cases, from a positive rule of *law*, but from the very nature of their disorder itself.

In the earliest ages of our law the rule which common sense dictates on this subject appears to have prevailed, namely, that a person deprived of the use of that reason which is the *instrument*, if I may so say, with which men contract, shall not be bound to his own injury by contracts made while in such a situation. Thus, in Fitzherbert's *Natura Brevium*, 202, n. it is laid down that a person who had enfeoffed another of his land while *non compos* might, on recovering his intellects, avoid the feoffment. But soon afterwards a doctrine was established of the most absurd description which [*227] it was possible *for the ingenuity even of an ancient lawyer to have devised. It was admitted that the acts and contracts of a lunatic could not be looked upon as valid so far as they affected other persons, but it was said that they should bind the lunatic himself, after he had recovered the use of his reason; "for," said the old lawyers, "a man cannot remember what he did when he was out of his mind, and consequently cannot recollect whether he did this or that particular act, or entered into this or that particular contract." And they actually carried this so far that it became a maxim that a *man should not be heard to stultify himself*, and it is laid down as such in the 405th and 406th sections of Littleton, and in *Stroud v. Marshall*, Cro. Eliz. 398, where the opinion of Fitzherbert to the contrary, in his *Natura Brevium*, was overruled.

However, in more modern times, the common sense of the courts began

Bennett, 9 Jur. 888, and *Hart v. Stevens*, above cited, where the administrator of a deceased widow sued on a note given her *dum sola*; it was held that the husband of the deceased, by receiving interest on the note during the life of the wife had not reduced it into possession; and accordingly, that he was a competent witness for the plaintiff by stat. 6 & 7 Vict. c. 85, notwithstanding any ultimate interest in the assets, and that receipts of interest by him were available to take the case out of the Statute of Limitations.

to be shocked by this doctrine, and Sir Wm. Blackstone, in his Commentaries, book ii. p. 291, argues with great force of reasoning against it. And in the later cases of *Yates v. Boen*, Str. 1104, and *Faulder v. Silk*, 3 Camp. 126, it seems to have been discarded; so that I think we are now justified in saying that it has virtually ceased to exist, and that the lunacy of one of the contracting parties may be shown by himself if sued upon a contract entered into while he was in that situation. However, it would not be for the lunatic's own *benefit to prohibit him *absolutely* from binding himself by any contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary necessities of life; and there are many modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him, and have been enforced. In the case of *Baxter v. Earl of Portsmouth*, 5 B. & C. 170, an action was brought against the Earl of Portsmouth for the hire of several carriages. It was proved that the carriages were suitable to his rank and fortune, and that the price charged for them was a fair and reasonable one, but on the other hand it appeared that an inquisition had issued out of Chancery under which the Earl was found to have been insane from a period long anterior to the time at which the carriages in question were supplied to him. The L. C. J. Abbott, before whom the case was tried, directed the jury that, as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contract, had no reason to suppose him of unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover; and the jury accordingly found a verdict for the plaintiffs. Mr. (now Lord) Brougham moved in the next term to set it aside, but the Court supported the direction of the Lord Chief Justice.

*In a subsequent case of *Brown v. Jodrell*, M. & M. 105, the lunatic was the chairman of a society called the Athenæon, and he had concurred in ordering work and goods to be supplied to them; for these Lord Tenterden held that he might be sued by the person who had supplied them. (See also *Dane v. Kirkwall*, 8 Car. & Payne, 679.) From these decisions it is plain that a lunatic's contracts are binding in many instances; and some treatises suggests that he stands on the same footing with an infant, and is liable only for necessities. But this is, I think, not quite so; nor would it be reasonable that it should be so; for, where a lunatic is permitted to go about and appear to the world as a person of sane mind, it would be very hard indeed to prevent persons who had supplied him with goods under that impression at a fair price from recovering because the articles were not necessities. And in the case I have just cited, of *Brown v. Jodrell*, an infant could not, I think, have been held liable for goods supplied to the Athenæon. One of the latest cases in which the subject has been canvassed, is that of *Tarbutt v. Bispham*, 2 Mee. & Welsb. p. 2, in which one of the questions was whether a lunatic laboured under the same incapacity to bind himself by stating an account as I have already shown you that an infant does. The case went off upon a different point, but the Court said that, had it *become material they would have granted a rule for the purpose of considering it.

There is another late case, argued some time ago in the Court of Queen's Bench, and in which the learning on this subject was very fully canvassed.

I am not aware whether the decision of the Court has yet been produced; but I mention it, in order that, if you should have occasion to consider any point connected with this subject, you may be aware that there has been this very recent case, and may make due inquiry.(a)

Upon the whole, this branch of the law is, even now, in a very unsettled state. Some parts, indeed, seem clear. It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practised no [*231] *imposition upon him. It seems equally clear that he is not liable when the other contracting party has taken advantage of his lunacy. Indeed that was the decision in *Levy v. Baker*, reported in a note to *Brown v. Jodrell*. But it appears to me to be still uncertain whether he be liable upon an executed contract to a person who knew of his lunacy, but did not take advantage of it, or upon any executory contract at all. If I were to conjecture, I should be disposed to think that in the former case he would be liable for necessities,(b) and in the latter case not liable at all. But these are merely my conjectures, and I request that you will attach no weight whatever to them.(c)

*As the law regarding the contracts of lunatics has experienced [*232] some alteration, so also has the law regarding contracts entered into by the class of persons whom I shall next specify,—I mean persons deprived of the use of their ordinary understanding by intoxication. It has been always admitted, that, if one man by contrivance and stratagem reduced another to a state of inebriety, and induced him, while in that state, to enter

(a) The case here referred to is probably that of *Clark and Another v. Medcalf* and *Others*, argued in the Court of Queen's Bench in Hilary Term, 1841, and in which the judgment was given in the following Trinity Term, but is not reported. It however threw no new light whatever on the subject, and was decided in favour of the plaintiffs, who were London agents of the defendants, who were country attorneys; the action was for work done and money paid as such agents, and on an account stated. One of the defendants pleaded insanity. But as there had been an executed contract, and for legitimate consideration, without notice of insanity, or any pretence of fraud by the plaintiffs, the Court adjudged for the plaintiffs, without entering into the question raised by the count on the account stated.

(b) The Courts of Chancery uphold the liability of a lunatic for necessities, and on his decease such debts are payable out of his real or personal assets. (*Wentworth v. Tubb*, 1 Young & Col. N. C. 171.)

(c) It remains to be seen, nevertheless, whether Mr. Smith's conjecture may not have considerable weight attached to it in deciding the law on a point which is still, we believe, in the same state of uncertainty as when he wrote this lecture in 1841.

As regards bills of exchange and all specialties, lunacy appears to have been held a good defence, whether there has been a knowledge of the insanity or not; but Lord Tenterden, C. J., seems to have qualified this doctrine in the case of *Sentance v. Poole*, 3 Carr. & Payne, 1. It was an action by an innocent indorsee to which insanity was pleaded, and the learned judge laid it down to the jury that they "should be satisfied that he (the defendant) was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind." This limits the defence, and brings it very nearly within the requirements of a plea of fraud. The case of *Alcock v. Alcock*, 3 M. & Gr. 268, where the maker of a promissory note was allowed to plead the insanity of the indorser at the time he indorsed, decides nothing more than that the Court will grant leave to a defendant to amend his pleas by adding that of insanity to the record, the fact of the indorser's lunacy having come to the defendant's knowledge after issue joined. It does not at all follow that the judges would have held otherwise than as Lord Tenterden held in *Sentance v. Poole*; the question there put, might have been left to the jury in the case of *Alcock v. Alcock*. The exact limit of this defence is undefined; and it would be presumptuous and useless to attempt to carry it further than Mr. Smith has done in the absence of more decisive authority.

into a contract, it would be void upon the ordinary ground of fraud; for the liquor would be in such case an instrument used by the one party to assist him in his plot against the other. (See *Gregory v. Frazer*, 3 Camp. 454, *Brandon v. Old*, 3 C. & P. 440.) But it has been supposed that, where the drunkenness of the contracting party was not occasioned by the fraud of the contractee, but by his own folly, he could not in such [*233] a case set it up as a defence; since, by doing so, he would take advantage of his own wrong. You will see this view taken in *Coke Litt.* 247, a, and even so late as *Cory v. Cory*, 1 Ves. 19. There are, however, several late cases, in which it seems to have been treated as erroneous. In *Pitt v. Smith*, 3 Camp. 33, issue had been joined upon the question whether there was an agreement between the plaintiff and defendant for the sale of an estate. It turned out that there was an agreement signed, in fact, but that one of the parties when he signed it was intoxicated; Lord Ellenborough said:—

“There was no Agreement between the parties, if the defendant was intoxicated, in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, or *non-assumpsit* to a promise, (a) and he directed a nonsuit, which the full court afterwards refused to set aside. In *Fenton v. Holloway*, 1 Stark. 126, Lord Ellenborough again ruled in the same manner. And see *Sentance v. Poole*, 3 C. & P. 1; *Cooke v. Clayworth*, 18 Vesey, 15.” (b)

(a) Under the new Rules of Pleading it must of course be specially pleaded.

(b) Intoxication avoids a contract when it is so complete as to prevent a man from knowing what he is about: in that state he is, in common parlance, “not himself,” nor are his acts his own. “It is just the same,” said Mr. Baron Alderson, (in *Gore v. Gibson*, 13 M. & W. 623, an action on a bill by indorsee against indorser, who pleaded drunkenness;) “It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism.” In that case the law was explained by the learned judges.

1. As regards the state of the drunken man where, said Mr. Baron Parkc, he enters into the contract in “such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether. A person who takes an obligation from another under such circumstances is guilty of actual fraud.” It can scarcely be that the other party can be ignorant of the complete drunkenness of the person he contracts with personally. But many cases might arise where the party suing was neither present nor cognisant of the state in which the defendant signed or authorised the contract. It seems that the question would there arise as to the consideration.

2. If the consideration were for necessities, Mr. Baron Alderson said that a party, “even in a state of complete drunkenness, may be liable, in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessities; so also where he keeps the goods when he is sober; although I much doubt whether, if he repudiated the contract when sober, any action could be maintained on it.” The Lord Chief Baron also said, “So a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober; although a count for goods bargained and sold would fail.” The distinction is thus well shown. To support a count of goods sold and delivered, proof of acceptance as well as delivery is requisite, and if there had been acceptance, the plea of drunkenness would not avail; the keeping of the goods would be proof of acceptance, and the sober assent thus evidenced would ratify the drunken contract. But into the support of a count for goods bargained and sold, delivery does not enter as long as the contract was complete at the time, and the plea of intoxication, if sustained, would be a complete defence, for there could have been no acceptance to waive it. Thus the defence of complete drunkenness, at the time of a contract can be waived only by a subsequent assent to the contract: as in the case of all executed contracts, of which the drunken man has availed himself; in such case and in such only it seems that he would stultify himself by pleading his drunkenness. If this be a sound conclusion from the doctrine laid down by the judges, it is submitted that the knowledge

[*234] *I have to direct your attention to aliens. And we again subdivide this class into two minor ones of alien friends, and alien enemies. With regard to *alien friends*, *they have a right to contract with the subjects of this country, and may sue on such contracts in the courts of this country. Bac. Abr. Aliens D., whether the contract was made in England or abroad, with this distinction, that if it was made in England, it is expounded according to the law of England; if abroad, according to the law of the country where it was made: but, whether it was made abroad or in England, the person who sues on it here must take the remedy here as he finds it, although, perhaps, abroad there might have *been a more advantageous one.

[*236] Thus, for instance, according to the law of England, if a bill of exchange be payable to A. or order, A.'s indorsement in blank, that is, his simply writing his name on the back, is sufficient to transfer the property in it to any one to whom he may think fit to hand it; whereas, according to the law of France, a special indorsement, that is, an indorsement naming the transferee, is necessary for the same purpose. Now if an action be brought in the Queen's Bench here by the indorsee of an English bill, he will recover on showing an indorsement in blank, whereas, if the action were brought by the indorsee of a French bill, he will be obliged to show a special indorsement. And the reason of this is that the law of the country where a contract is made, being by implication incorporated into the contract, it is considered to be part of the contract arising on such a bill made in England, that it shall be transferable by an indorsement in blank, and part of the contract arising on a French bill that it shall be transferable only by a special indorsement. See Trimbeay v. Vignier, 1 Bing. N. C. 151. Again, to an action on a bill of exchange, the French period of limitation is *five* years, ours is *six*; now, if an action be brought here on a French bill, the courts here will not adopt the French period of limitation, but our own, and so the payee may recover here at any time within six years, though in France, where *the bill was made, he must have brought his action


[*237] within *five*; the reason for which is that the period of limitation within which a remedy is to be pursued is part and parcel of the remedy itself, and, though a *contract* is interpreted by the law of the country where it is made, the *remedy* must be pursued as it exists in the country where the suit is brought.

I have rather digressed for the purpose of pointing out these two rules to you. They are two of the most celebrated principles of our law, and there is scarcely any question arising on a foreign contract which they will not solve. You will see them carried out and explained in *British Linen Company v. Drummond*, 10 B. & C. 903, *De la Vega v. Vianna*, 1 B. & Ad. 284.

So far with regard to contracts made with alien friends; now with regard

of the plaintiff of the drunkenness at the time is immaterial as to the liability or non-liability of the drunken party to the contract, which does not depend upon the fraud or innocence of the defendant, but on the mental incompetence of the plaintiff. It is obvious that to render it necessary to prove not only that the contractor was drunk, but also that the party suing knew it, would open a door to easy resources for the purpose of effectually preventing any such proof being given on the part of the sufferer.

to *alien enemies*, i. e. aliens whose governments are at war with this country. All contracts made with them are wholly void ; *Brandon v. Nesbitt*, 6 T. R. 23, *Willison v. Pattison*, 7 Taunt. 439 ; in which latter case it was decided, that, if the contract was made during war time, it does not become capable of being enforced even on the return of peace. Although if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify *him [*238] from so doing. (*Flindt v. Waters*, 15 East, 260.) (a)

Another class of persons who are disabled from enforcing contracts are outlaws and persons under sentence for felony ; see *Bullock v. Dobbs*, 2 B. & A. 250. They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them. *Macdonald v. Ramsey*, *Foster*, C. L. 61. 

There is one other class, I was about to say of individuals, but that would have been incorrect, (for, although *persons* in the eye of the law, they are not individuals in common parlance,) *regarding whose power of contracting I have a few words to say,—I mean *corporations aggregate* [*239] *gate*. A corporation aggregate consists, as you know, of a number of individuals united in such a manner that they and their successors constitute but one person in law. Thus, the mayor, aldermen, and burgesses of a borough are a corporation, and as such, have an existence distinct from that of the individual mayor and of the individuals enjoying the franchise of burgess, or post of alderman. But then, this corporate existence being an ideal one, and the creature of the law, it is obviously impossible that the corporation can contract in the same way as an ordinary person. Accordingly the law, the creature of which, as I have said it is, has provided for it a mode of contracting, namely by its common seal, which, being affixed to the contract, authenticates it and makes it the deed of the corporation ; and, as a general rule, that is the only way in which a corporation can contract ; see *Charlton v. Mayor, Aldermen and Burgesses of Ludlow*, 6 M. & W. 815. But to this rule, as to most other general rules, necessity and the convenience of the world has occasioned some exceptions ; the principal of which is that where an act of parliament has created a corporation for mercantile purposes, it is allowed to enter without seal into certain contracts which are usually entered into without seal by commercial men. For instance, *bills of exchange (see *Church v. Imperial Gas Light Company*, and *R. v. Bigg*, 3 P. Wms. 419.) And there are some [*240]

(a) "The Alien Act, 7 & 8 Vict. c. 66, s. 16, enacts that any woman married or who shall be married to a natural-born subject or person naturalised, shall be deemed and taken to be herself naturalised, and have all the right and privileges of a natural-born subject ;" and section 3, renders all children born of a natural-born subject of the United Kingdom capable of taking to him his heirs, &c. any estate by devise, purchase, or inheritance of succession. These enactments, together with those which preceded them, make all children born of parents, either of whom is British or Irish, natural subjects, and thus relate equally to those born before and after the act of 7 & 8 Vict. c. 66, which also gives additional privileges to alien friends for the tenure of hereditaments, chattels real, as well as personal property, with the same rights and remedies as natural-born subjects. According to the previous provisions it seems that if the mother has married an alien enemy her children, though the sons of an alien enemy, will still be entitled to all the rights and remedies of natural subjects, and that all contracts made by them can be enforced in our Courts.

acts of trifling importance which every corporation may do without deed, and of which you will see an enumeration in Comyn's Di Franchises, F. 13, and the judgment of the Chief Justice of the Common Pleas in East London Waterworks Company v. Bailey, 4 Bingh. 283. These exceptions seem, however, to depend on no settled principle; and the only safe general rule to rely upon in practice is, that a corporation can contract only by deed under its common seal, unless there be some express authority in favour of its being allowed to make the particular contract in question without seal, or unless there be some act of parliament conferring on it powers different from those possessed by corporations in general. (See, for cases in which the power of a corporation to act without deed has been discussed, Broughton v. Manchester and Salford Waterworks Company, 3 B. & A. 1, Smith v. Birmingham Gas Light Company, 1 A. & E. 526, Beverley v. Lincoln Gas Light Company, 6 A. & E. 844.)(a)

[*241] *I have now specified the various classes of parties with regard to whose competency to enter into contracts, I had any particular observations to make, and now, assuming that none of the various cases of disability which I have mentioned arises, but that the parties entering into a contract are competent by law to do so, there remains one other very [*242] important subject to advert to, namely, the mode in which they may become parties to the contract. And this must be in one of two ways; either personally or by the intervention of an agent.

There are few branches, perhaps no branch of the law of England, to which it becomes so often necessary to refer as that which regulates the rights of parties under contracts made by agents. The truth is, that as society is now constituted, the business of life has become so complicated that "no man's individual efforts can embrace all the subjects with which he is called on to deal." Hence we are obliged to transact a variety of business and enter into a variety of engagements through the medium of agents, the precise effect of whose acts in binding or advantaging us becomes of course a matter of the utmost practical importance. I cannot however attempt, in the time which remains to me for that purpose, to do more than

(a) The settled rule is, that for trivial matters frequently occurring, and essential to the business of the corporation, and such as do not admit of delay, actions of simple contract may be maintained, and the plaintiffs not required to show an engagement under the common seal. (Hull v. Mayor of Swansea, 5 Q. B. 526.) But all important matters, neither of frequent occurrence nor of immediate urgency, such, for instance, as the appointment of an attorney to conduct important suits, must be contracted for under the seal of the corporation. (Arnold v. The Mayor of Poole, 4 M. & Gr. 860.) But where a contract without seal, and yet not falling under any of the exceptions, has been performed on the part of the corporation, and the other party has benefited by that performance, such contract ceases to be *nudum pactum*, and the corporation may enforce it in an action of *assumpsit*. (Fishmongers' Company v. Robertson, 5 M. & Gr. 131.) The principle of this recent decision is, that the defendants, having received the full amount of the consideration, which was voluntarily performed by the plaintiffs, can have no need to sue on the contract themselves, though, as long as the contract remained wholly executory, neither could the company have sued on one which they could not have been compelled to perform, but which having performed on their part, they had a reasonable right to enforce against those who had reaped the benefit of their integrity.

A distinction was once taken between the power of corporations to sue on executed and executory contracts, which the case of Church v. The Imperial Gas Light Company, above cited overruled.

The case of the Fishmongers' Company v. Robertson, shews that contracts of corporations not under seal are *voidable*, but not *void*. (See note on Contracts by "Public Companies," post, p. 257.)

state the general principles by which the subject (so far as relates to contracts) is regulated.

Generally speaking, whatever contract a man may enter into, in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. There are, indeed, one or two exceptions to this rule, which arise out of the wording of certain acts of parliament, requiring the intervention of the principal party himself in certain contracts. For instance, a man cannot appoint an agent to sign a writing for the purpose of exempting a case from the operation of *the Statute of Limitations. *Hyde v. Johnson*, 2 Bing. [*243] N. C. 777.

But, generally speaking, whatever contract a man may lawfully enter into himself, he may appoint an agent to enter into for him. Now the considerations on which I shall have occasion to touch relate to *one of four points* into which what I have to say on the subject may be conveniently enough distributed; and they relate to the questions:—

1. *Who may be an agent.*
2. *How an agent is appointed.*
3. *How far his contracts bind his principal.*
4. *How far the principal may be advantaged by them.*

Now with regard to the *first* point, namely, *who* is competent to be an agent, I have to observe, that it by no means follows that a person who is not competent to contract himself, is therefore not competent to contract as agent for another person; thus, it has been decided that an infant may be an agent, or even a married woman, though she could not have contracted in her own right. *Pretwick v. Marshall*, 7 Bing. 565, *Prince v. Brunatte*, 1 Bing. N. C. 438. But it is held that, upon the peculiar wording of the Statute of Frauds, one of two parties entering into a contract such as we have seen that act requires should be in writing, cannot be agent for the other, even with the other's consent, so as to bind him by his signature to such a *writing. See *Wright v. Dannah*, 2 Camp. 203, *Fairbrother v. Simmons*, 5 B. & A. 333. [*244]

With regard to the second point, namely, in what manner an agent is to be appointed. Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. But there are some cases in which the common or statute law *does* require a particular mode of appointment; for instance, it is a rule of common law that an agent who is to contract for his principal by deed, must himself be appointed by deed. *Harrison v. Jackson*, 7 T. R. 209.

Again, a corporation, as it can, generally speaking, do no act except by deed; so it cannot, generally speaking, appoint an agent in any other way. There are, indeed, one or two exceptions to this, as to the rule which obliges them to contract by deed, particularly in the case of trading companies; but, as I have already said, the general rule is certain, but it is impossible to reduce the exceptions to any very clear principle. You will find the rule and the exceptions discussed in *Dunston v. Imperial Gas Light Company*, 3 B. & Ad. 125. With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, the Statute of Frauds, the 1st, 2d, and 3d sections of which require, in express terms, that the agent

[*245] who is to do any of the acts mentioned *in those sections shall be appointed by writing, whereas the 4th and 17th sections contain no such provision.

With regard to the third point, namely, in what cases the principal is bound by his agent's contract. It is of course obvious at first sight, that so far as the agent's authority extends, his principal is bound by all acts done in pursuance of that authority. So far, there can be no doubt or difficulty whatever. But the cases in which doubts and difficulties arise, are those in which the agent has gone beyond his authority, has made some contract which his instructions do not authorise, and then the question arises whether his principal shall or shall not be bound by it. Now, in order to solve this question, it is necessary, in the first instance, to understand the distinction between *general* and *particular* agency. A general agent is an agent entrusted with all his principal's business in some specific line, of some specific kind. A particular agent is an agent employed specially for some one special purpose. For instance, if I entrust another with the sale of a particular horse, of which I am desirous of disposing, he is a *particular* agent to transact that particular business. But if I appoint an agent to sell all my horses, and consign horses to him from time to time for sale, he is my *general* agent in that line of business. Now, there is this important distinction between contracts made by general, and those made by [*246] particular agents, namely, that if a particular agent exceed his authority, his principal is not bound by what he does; whereas, if a general agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of business he is deputed to transact. For instance, if I employ A. to carry a bale of cottons from Manchester to Liverpool, and he sells them, I am not bound by the sale, but may bring an action of trover for them against the purchaser; whereas, had I entrusted them to my factor for the same purpose, I should have been bound by the sale, that being a transaction within the ordinary scope of his business as factor. See *Whitehead v. Duckett*, 15 East, 408, *Fenn v. Harrison*, 4 T. R. 177, *Sykes v. Giles*, 5 M. & W. 645.(a)

(a) The law relating to factors is regulated by the 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39.

The former act provides "that it shall be lawful to and for any person to contract with any agent entrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent: provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorised to sell the same or to receive the said purchase money." The construction of this statute having given rise to litigations, see *Bonzi v. Stewart*, 5 Scott, N. R., and *Hatfield v. Phillips*, 9 M. & W. 647, the 5 & 6 Vict. c. 39, was passed, which enacted, "that any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and that such contract shall be binding upon and against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." And the 4th section enacts, "any bill of lading, India warrant, warehousekeep-

*Now the reason for this is very clear and simple: it is that the public may not be *deceived. If strangers see A. [*247-*248] selling my goods day after day, month after month, and see me recognizing the transactions, and receiving payment on that understanding, they may naturally enough suppose that I have given him a general authority to sell, and that they may safely deal with him on any account; and it would be hard indeed if I were allowed to turn around upon them and say, "True, he has a general authority, but I had revoked it in this particular instance." But, in the case of a particular agent, it is otherwise; for, as he is employed on one particular occasion only, there are no previous acts done by him for his principal, or recognitions of them by the principal, which can have a tendency to mislead any one. And there is no hardship in *saying [*249] to the person who deals with him, "You must satisfy yourself that he is my agent at all, and when you do so, you may as well satisfy yourself for what purpose he is my agent, and how far his authority extends."

Such then is the distinction between a particular and a general agent; and, with regard to the latter, there is, for the further protection of the public, this further rule, *that the authority of a general agent is, as far as the public are concerned, measured by the extent of his usual employment.* This is also a rule of common sense as well as law; for what I see a man continually doing with the approbation of another, I may fairly conclude he has a general authority to do. I have not, it is true, seen his instructions, but I am justified in believing that he acts in accordance to them when I see that his principal does not signify disapprobation of his proceedings; and therefore the rule is that where a man permits another to act generally for him in any line of business, he is bound by contracts made by that other in that line of business; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all. This is laid down by Lord Holt, in homely, but forcible language, in Shower, 95, where it is thus reported:—

"*Memorandum*,—Upon evidence in an assumpsit for wares sold, it was held by Holt, C. J., that if a man send his servant with ready money

er's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document, to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act: and any agent entrusted as aforesaid, and possessed of any such document or title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been entrusted with the possession of the goods, or of any other document or title thereto, shall be deemed and taken to have been entrusted with the possession of the goods represented by such document of title as aforesaid; and all contracts pledging or giving a lien upon such document of title as aforesaid, shall be deemed and taken respectively pledges of, and liens upon the goods to which the same relates," &c.; "and an agent in possession as aforesaid of such goods or documents, shall be taken, for the purposes of this act, to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence." This act seems to have effectually explained the law on this subject; the only reported case on it is *Learoyd v. Robinson*, 12 M. & W. 745, which was decided on the facts.

A broker has not, like a factor, the possession of the goods of his principal; his authority is merely to effect the sale, and, having done so, he is *functus officio*. (See *Baring v. Corrie*, 2 B. & Ald. 137.) The duties of a broker are too well understood to render any statement of them necessary. As to the distinction between these general duties, and the express agreements into which they may enter, see *Boorman v. Brown*, in Error, 3 Q. B. 511, confirmed by the House of Lords; 11 Cl. & Fin. 1.

[*250] *to buy meat or other goods, and the servant buys upon credit, the master is not chargeable. But if the servant usually buy upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, the master is chargeable." There is a case of *Rusby v. Scarlett*, 5 Esp. 76, which affords a good illustration of this. See also *Trueman v. Loder*, 11 A. & E. 591, *Pickering v. Busk*, 15 East, 38, *Watkins v. Vince*, 2 Stark. 368.(a)

(a) Agency is thus often implied, and the same laws attach to it as well as when it is created by express authority. It is implied, from the position or capacity in which a person acts. Of this description is the agency of brokers, of partners, wives, and servants, all of whom have an implied or constructive authority to bind those for whom they act, or are held to act, as we shall presently see more at large. Many cases occur where there is no such constructive or express authority at the time of the contract; but where it has been supplied by the subsequent assent or adoption of the principal, in which case his liability depends upon the same principles as before; the subsequent ratification is equivalent to a prior command, and the great maxim of agency, "*Qui facit per alium facit per se*," has a retrospective effect. (See *Wilson v. Tumman*, 6 M. & Gr. 236; and *Foster v. Bates*, 12 M. & W. 226; and *Lewis v. Read*, 13 M. & W. 834.)

The usages of trade form material points in determining the authority of an agent; and the custom of an individual as to the general mode and scope of his dealings with tradesmen, would, in the cases above named, limit the implied authority of his servants to bind him by their orders. (*Hunter v. Berkeley*, 7 Car. & Pay. 413.) Wherever acts are done inconsistent with the express directions or with the customary transactions from which agency may be implied, there is, *prima facie*, an excess of authority, and the principal is not bound. In *Fleming v. Hector*, 2 M. & W. 181, it was held, on similar grounds, that where there is a managing committee of a club, who choose to deal on credit instead of ready-money payments, which they were alone authorised by the members to do, the members are not bound by such contracts. The same principle applies to partners. (See *Hasleham v. Young*, 5 Q. B. 833, and post, p. 253.)

See instances where the agent had exceeded his authority, and did not bind his principal, in *Rotton v. Inglis*, 2 Q. B. 667; *Fearn v. Filica*, 7 M. & Gr. 513; *Richardson v. Cartwright*, 1 Car. & Kir. 328; and where, having authority, he did not exceed it, and therefore bound his principal. See *Pott v. Beavan*, 1 Car. & Kir. 325.

An agent who exceeds his authority is personally liable for the contracts he makes; and in *Polhill v. Walter*, 3 B. & Adol. 114, a leading case on this point, an agent was held liable who accepted a bill of exchange, *per pro*, under the *bona fide* belief that it would be sanctioned by the person for whom he signed. Thus agents are liable for excesses of authority which they have the means of knowing to be such. To this extent the law goes in the subsequent judgment in *Smout v. Ilbery*, 10 M. & W. 1, which clearly classifies and explains the different ways in which an agent may make himself liable, and which we have already partly cited; the classes are thus summarily defined:—First, where there is a "fraudulent misrepresentation of his authority, with an intention to deceive." The second case is, where he has no authority, and knows it, but nevertheless makes the contract at having such authority. In that case, on the plainest principles of justice, he is liable: for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. *Polhill v. Walter* falls within this class.

The next class is that where the agent "*bona fide* believes that authority is vested in him, but has, in fact, no such authority." In this case the Court held that he is *still personally liable* (see ante, p. 144, note,) and which, we humbly submit, is law, notwithstanding the conflicting judgments upon the principle from which this liability arises. The liability is defended, as we have already shewn, on the ground that a man is justly responsible for the carelessness which occasions a mis-statement by which others are injured. It must, however, be remembered that this doctrine is irreconcilable with the subsequent decisions in *Taylor v. Ashton*, and *Collins v. Evans* (see p. 144, ante,) for it is impossible to draw any sound distinction between the misrepresentations of agents who hold themselves to have an authority they do not possess, and any other mis-statement, on the faith of which another is injured. There is one case only in which the agent is clearly not liable for misrepresenting his authority; it is where he had no means of knowing that he was exceeding it. This occurred in the case of *Smout v. Ilbery*; a widow ordered goods as for her husband when he was dead, but, before his death, which happened in China,

*But all this is subject to the observation, that the person who contracts with the agent has not **notice* of the limitation of his authority. It is very right that a stranger who sees an agent **permitted* to contract generally for his principal in this or that business should be safe in dealing with him, on the assumption that he has authority. But if he *knows* that he has no authority, in that case to hold the principal bound by a contract made contrary to the agent's real instructions, would be to give effect to a fraud; and accordingly, wherever the person who contracts with an agent *knows* that that agent's authority is limited, and nevertheless contracts with him beyond those limits, he does so at his peril, for the principal is not bound. See *Trueman v. Loder*, 11 A. & E. 591. And on this account it is wise and usual for persons who have been in the habit of employing a general agent, and are desirous of discontinuing him, to give notice to the world of their intention in the *Gazette*, and to those persons with whom they are in the habit of dealing by circulars. (a)

*The consideration of the 4th point must be deferred. [*254]

could have reached her knowledge. Here she was held not to be liable, on the express ground that she had done no wrong, and was guilty neither of *mala fides*, nor want of due diligence in acquiring knowledge of the revocation—no *omission* to state any fact within her knowledge relating to it. The rule, therefore, resulting from the cases is, that wherever the agent exceeds his authority *either knowingly or negligently*, he is personally liable on his undertaking, if *Smout v. Ilbery* be law: if *Taylor v. Ashton* be law, then only if he knowingly exceeds it. It is to be regretted that so important a rule cannot be laid down otherwise than hypothetically.

(a) The recent cases involving a consideration of the law of agency have chiefly arisen upon partnership contracts; for it has been well said by a learned judge that "all questions between partners are no more than illustrations of the same questions as between principal and agent." (9 M. & W. 98.) Partnership exists wherever two or more persons enter into a joint concern or undertaking, of which they are to share the profits and losses.

Now, wherever one or more partners contract for and on behalf of the firm, they act for and bind every member of it: and every member of it is individually liable upon it, whether he be a known or a dormant partner, (*Fox v. Clifton*, 6 Bing. 795,) provided the contract be one in the ordinary course of the partnership business, but not otherwise. (*Adams v. Bankarts*, 1 Cr. M. & Ros. 681; *Hasleham v. Young*, 5 Q. B. 833.)

There is nothing, however, to prevent the parties from confining the credit to an individual partner; and it is a question for the jury whether this has or has not been done. Where there has been nothing to discharge a partner from his liability, or to rebut the presumption of authority to pledge his credit arising from the mere fact of his being a partner, he is clearly liable: but where there are facts to shew that it was the intent of the contracting parties to restrict the credit to one of several partners, the liability is limited by such intent. Cases of this description occur where the partner represents himself as the only person composing the firm. (See *De Mantort v. Saunders*, 1 B. & Adol. 398; *Blomfield v. Wilson*, 12 M. & W. 405.) Or where one person has authority to contract on his own account only, and not on behalf of the other partners. (*Wilson v. Whitehead*, 10 M. & W. 503.) The result is that the liability arising from the naked fact of partnership is *prima facie*; and may be rebutted by direct evidence that credit was not given to the partnership, but to an individual member of it. (See *Smith v. Watson*, 2 B. & Cr. 401, and *Peacock v. Peacock*, 2 Camp. 45.) This doctrine is very strongly corroborated by one of the latest cases on the point. (*Holerost v. Hoggins and others*, 15 L. J., C. P., 129.) The plaintiff had been engaged to write articles in the "*Newcastle Advertiser*," by a person who at the time of the contract had become in fact the sole proprietor of the newspaper, and the two defendants were sought to be made liable in consequence of their having suffered their names to remain as registered **proprietors* of the newspaper in the declaration required to be filed by 6 & 7 Will. 4, c. 76, they having previously been proprietors of the newspaper, but having ceased to be so before the contract in question was entered into. It was adjudged not only that the defendants were not liable, but that the fact of their being co-proprietors was wholly immaterial, though they held themselves out as such, if it was shewn that another partner contracted with the plaintiff in such a manner that credit was given to him and not to them.

It must also be shewn that the debt for which an action is brought accrued during the time the party sued was actually in partnership. He will be liable neither for contracts

made before nor after he became a partner, provided he gives proper notice of his retirement. (*Beech v. Eyre*, 5 M. & G. 424, per Tindal, C. J. See also *Ridgway v. Philip*, 1 Cr. M. & Ros. 415, and *Vere v. Ashby*, 10 B. & Cr. 288.)

It has been long held that dormant partners are equally liable with ostensible partners upon all contracts made for the firm during their partnership; on the equitable principle that the dormant partner being entitled to all the profits of the contract made by the firm to which he belongs, ought also to share in the liability; he having a right moreover to sue others on it, he ought not to be protected from being sued on it by them: for "Qui sentit commodum sentire debet et onus." It is therefore decided that as an undisclosed principal may be made liable as soon as he is discovered, subject to all the equities between the parties; so may an undisclosed partner. Neither is there any distinction between express or written contracts, and those which are implied or verbal. This was decided in the case of *Beckham v. Brake*, 9 M. & W. 79, expressly overruling a contrary decision in *Beckham v. Knight*, 4 Bing. N. C. 243. But a contract under seal can bind none but those who execute it, (per Lord Abinger in *Beckham v. Drake*,) unless express authority be given to them for that purpose.

Nominal partners are as liable as dormant ones, not because they are principals for [*256] whom others are agents, but on the ground that credit may *have been given to them, and it is just to the creditor that they should be responsible for the result of holding themselves out to the world. (*Waugh v. Carver*, 2 H. Bl. 242.)

A general notice is sufficient to discharge partners who retire from firms *quoad* the world at large, but an express notice is requisite to discharge them as regards previous customers. This being done, the retiring partner is effectually discharged from all debts subsequently accruing, nor can he be made liable by any unauthorised use of his name by his previous partners, (*Abel v. Sutton*, 3 Esp. 108,) though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership of course remains. (*Whitehead v. Hughes*, 2 C. & Mee. 310; *Porter v. Bristow*, 6 M. & Sel. 156; *Wood v. Braddick*, 1 Taunt. 104; *Biggs v. Fellows*, 8 B. & Cr. 402.) Where notice is given to a firm by a retiring partner of some other firm, in all cases of *ordinary* co-partnership notice to one member is notice to all. (*Porthouse v. Parker*, 1 Camp. 82; *Jacand v. French*, 12 East, 317.) So notice to the Bank of England is held to be notice to all its branch banks, (*Wallis v. The Bank of England*, 5 Ad. & Ell. 21,) for notice to the principal is notice to the agent. (*Mayhew v. Eames*, 3 B. & Cr. 601.) This rule, however, does not apply to joint stock companies suing in the name of a public officer, unless the member of it who has notice is also a member of the managing body, such companies not being ordinary co-partnerships. (*Powles v. Page*, 15 Law Jour., C. P. 217.) In such cases the notice must be given to the managing body. Such are the general rules which govern the discharge of retiring partners from their liability, but wherever there is an express agreement that a creditor shall accept the liability of the retiring partner, instead of that of the remaining firm, the general rule is of course waived by the special agreement. (See *Kirwan v. Kirwan*, 2 Cr. & Mee. 623, and *Thompson v. Percival*, 2 B. & Adol. 927.)

In *Farrar v. Deflinne*, 1 Car. & Kir. 580, the defendant had been a dormant partner, but ceased to be so before the debts accrued for [*257] which the action was brought. The plaintiff had known of the partnership, but the dissolution not having been advertised he had no knowledge of it. Mr. Justice Cresswell said, in summing up the case, "The law stands thus: if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for *all but actual customers*; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons*, as if the existence of the partnership had been notorious." (See also *Evans v. Drummond*, 4 Esp. 88, 90, per Lord Kenyon, C. J.)

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner: but not so where the partnership is not of a commercial nature, such as attorneys for instance, in which case it must be shown that the party accepting or drawing had special authority to do so, even where it is done in the name of the firm. (*Hedley v. Bainbridge*, 3 Q. B. 316; *Levy v. Pyne*, 1 Car. & Marsh. 453.) Where one partner signs for the firm, he is not separately liable, but the firm alone. (*Exparte Buckley in re Clarke*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & Cr. 407.)

Partners not liable for the fraudulent contracts of a co-partner, if they can prove the knowledge of the fraud by the plaintiff. (*Musgrave v. Drake*, 5 Q. B. 185.) Neither are they bound where an express warning was given to the plaintiff by the partners sought to be charged.

For the rule of pleading in actions by and against partners, see 1 Saund. 291, b. et. seq.

CONTRACTS BY PUBLIC COMPANIES.

The peculiarities attending contracts to which public companies are parties, have acquired greatly increased importance from the tendency of commercial enterprise since these lectures were written, and it is *requisite that the principles which govern [*258] them be developed.

Most joint stock companies formed since November 1, 1844, are now regulated by the 7 & 8 Vict. c. 110, and according to the 2d section.

"Except where the provisions of this act are expressly applied to partnerships existing before the said first day of November, it shall be held to apply only to partnerships, the formation of which shall be commenced after that date: provided, nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, areaway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament; provided also, that except as hereinafter is specially provided, this act shall not extend to any company incorporated, or which may be hereafter incorporated, by statute or charter, nor to any company authorized, or which may be hereafter authorized, by statute or letters-patent, to sue and be sued in the name of some officer or person."

Now under this act it is required that all companies shall be registered first provisionally, and afterwards completely registered. And before provisional registration (sect. 24), the promoters of a company are not to allot shares, issue scrip, or receive deposits, either absolutely or conditionally, or make any contract whatsoever in the name, or on the behalf of such intended company, under the penalty of a sum not exceeding twenty-five pounds, recoverable by any person by action of debt.

When provisionally registered the intended company may open subscription lists, allot shares, and receive deposits of not more than 10s. per cent. on every share; and also in companies executing any "railway" and other works by act of parliament, such further deposit as the standing orders require. But they are "not to make calls, not to purchase, contract for, or hold lands, nor to enter into contracts for any services, or for the execution of any work, or for the supply of any stores, except such services and stores, or other things, as are necessarily *required for the establishment of the company; and except any purchase or other contract to be made conditional on the completion of the company, and to take effect after the certificate of complete registration, act of parliament, or charter, or letters-patent, shall have been obtained; and except, in the case of companies for executing such works as aforesaid, contracts for services in making surveys and performing all other acts necessary for obtaining an act of incorporation, or other act for enabling the company to execute such works." [*259]

All contracts, therefore, which do not fall within the pale of these sections are illegal and cannot be enforced.

When the company is completely registered, if it be not one which requires an act of parliament, it is fully empowered to act and contract like any other company, subject, however, to the proviso contained in section 44, which requires that "except contracts for the purchase of any article, the payment or consideration for which doth exceed the sum of fifty pounds, or for any service, the period of which doth not exceed six months, and the consideration for which doth not exceed fifty pounds, and except bills of exchange and promissory notes: be it enacted, that every such contract shall be in writing, and signed at least by two of the directors of the company, on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case." All contracts under 50*l.* are to be entered into by some officer authorized by the company, who is to report it to the secretary, under pain of forfeiting its amount.

There are similar provisions with respect to notes and bills of exchange, and every deed must be signed by two directors of the company. Ss. 45 and 46.

No contract, therefore, can be enforced which does not comply with these requirements. It is worthy of remark that these clauses will, in all probability, effect considerable change in the mode in which agreements are drawn to which companies are parties, and which ought not *to be in the name of trustees, but according to the express terms of this section in that of two directors of the company. Such are the regulations respecting contracts which affect new joint-stock companies falling within the description given in the above cited section. [*260]

The act also provides with regard to the sale of scrip, that "until such joint-stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for, or sale or disposal of such share or

interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding 10*l*.

It has been decided by the Court of Exchequer, in the case still unreported of *Young v. Smith*, on Jan. 26, 1846, that this section does not relate to railway companies. In other companies within the scope of the act all such sales are illegal and void; and, therefore, were any such sale effected, the vendee could not recover the purchase-money from the vendor upon the principles already fully discussed in treating of illegal contracts.

The case, however, is different where the sale of scrip has been legal, and where the undertaking having been abandoned, there is a failure of consideration. The right of action by the vendee to recover the purchase-money depends on two main points; first, whether the vendee had become a partner in the concern, in which case it is clear that no action will lie against his co-partners; and if that be not so, then, secondly, whether the company have failed to carry out the terms of the prospectus, or other professions, on the faith of which the purchase was made.

Now the mere purchase of scrip will not constitute the purchaser a partner in the undertaking unless he signs the subscribers' agreement or subscription contract, and thereby embarks in the concern. The case of *Fox v. Clifton*, 6 Bing. 776, is a leading authority on this point, and it is there held that persons are not partners who have not been entitled at any time to demand a share of profits, and where the conditions are not fulfilled upon which they subscribed, and where the matter has proceeded no farther than an offer to become partners in a projected concern which has proved abortive before the period at which the partnership was to commence.

And the judgment in that case limits partnerships to "*those subscribers, who, by executing the deed, have declared themselves partners, and to any who have by their subsequent conduct recognised and adopted the acts and contracts of the directors,*" thus holding themselves out as such.

These, as regard public companies, are the predicaments of partnership; and other cases have borne out this doctrine.

In *Holmes v. Higgins*, 1 B. & C. 74, several persons subscribed to an undertaking for forming a railway and obtaining an act of parliament for that purpose. A bill was brought into parliament accordingly, but met with opposition, but was ultimately withdrawn. It was held that the persons so subscribing were an association of persons for a common purpose, and therefore partners in the undertaking.

The recent case of *Lucas v. Beach*, Bart., 1 M. & Gr. 417, was that of an inchoate partnership for the purpose of obtaining an act of parliament; the plaintiff was held to be a partner, having subscribed for two shares, and therefore disentitled to sue the committee for work and labour done. *Holmes v. Higgins* was cited and confirmed by *Tindal, C. J.*, in the judgment.

In *Maudsley v. Leblanc*, 2 Car. & Pay. 409, *Bayley, J.*, held that, though there was no evidence that the defendant had, according to the terms of the prospectus, executed the deed, "he should take it for granted that he had done so: that he was liable as a partner, he was at the meetings of the directors acting from time to time, and went to see the works in progress; and therefore it was impossible to say he was not a partner." See also *Becch v. Eyre*, 5 M. & Gr. 415.

In *Bourne v. Freeth*, 9 B. & Gr. 632, on the other hand, it was held that where a prospectus had been signed by the defendant merely importing that a company would be formed, this was not sufficient alone to constitute a partnership, inasmuch as the defendant "had not thereby given authority to any person to carry on the business on his account." *Dickenson v. Valpy*, 10 B. & Cr. 141, to which we shall presently refer, is to the same effect. See also *Meigh v. Clinton*, 11 A. & E. 418; and *Pitchford v. Davis*, 5 M. & W. 2.

These cases fully establish that there must be some act, express or constructive, constituting a man a member of a company to render him a partner at all.

If the purchaser of scrip be not a partner, the next question is, have the company failed to fulfil their implied contract, and to what extent they are liable in the event of failure.

This must necessarily depend in great measure on the facts of each case. Where, however, the company have acted *bona fide*, and have not failed in efforts to carry out the undertaking and give effect to the contract with the scrip-holder, there is but one case which goes the length of deciding that they are liable, and it is submitted that that case cannot be sustained.

In *Kempson v. Saunders*, 4 Bing. 5, the defendant sold the plaintiff shares in a projected company for constructing a railroad, upon which a deposit had been paid by the original holder, of whom they had been purchased by the defendant; the committee who had framed the project and issued the scrip agreed that *nothing should be done till the sanction of the legislature was obtained*; they afterwards abandoned the project, and no act was obtained; upon the failure of the scheme, the plaintiff sought to recover the purchase-money in an action for money had and received to his use. A verdict was found for the

amount, on the ground that the consideration for the payment had failed; and it was upheld by the Court of Common Pleas. Best, C. J., said: "The defendant sold a nothing, an alleged title of no value. If he bought of another he may sue the seller, and the seller the party from whom he purchased, till at last he come to the original projectors." As regards this case, whatever may have been the law when joint-stock companies were comparatively in their infancy, it is clearly different now when they are regulated [263] and sanctioned by act of parliament, and when it would be obviously a most serious restraint on trade, so far to check associations for purposes of commercial enterprise, as to make them guarantee the ultimate success of every scheme legitimately conducted by them, and ensure it against all hazards and contingencies to those who chose voluntarily to embark in it.

But where, as in the leading case of *Nockels v. Crosby*, 3 B. & Cr. 814, the party purchasing had not joined the company, but paid money on the faith of a prospectus or scheme which was never carried out, it was held that the purchaser was entitled to recover his money, and that case has been very recently acted on in that of *Walstab v. Spottiswoode*, 15 Law Jour. Exc. 193, (one of considerable hardship to the defendant,) but which was necessarily governed by the same principle. The plaintiff had applied for an allotment of shares in a projected railway, and paid her deposit money upon a promise that she should receive the scrip. The shares were allotted, but before the delivering the scrip the project was obliged to be abandoned, and the deposit minus the share of the plaintiff in the expenses, was offered to her, but she refused to receive it, and sued for the whole amount. The court held that she was entitled to it, first, because she had never become a partner; and, secondly, because the affair must have necessarily proved abortive, and did not realise the terms of the prospectus.

The liability of those who embark in a public company to those who enter into contracts with it, depends upon grounds somewhat different. According to the tenor of the leading cases, *every person who is either actually, a partner, or who by his acts has held himself out as such, is liable upon such contracts as the company had a right to make consistently with its objects and the usages of business.*

In such cases responsibility arises from the implied authority which flows from the relation of partnership. Thus, either actual or quasi partnership will suffice. As regards actual partnership, it is laid down in the leading case of **Dickenson v. Valpy*, 10 B. & Cr. 140, per Parke, B., that "if there is a complete partnership between two [264] or more persons, one partner does communicate to the other standing in the relation of complete partner all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged."

Now this rule was applied to the case of shareholders; and a shareholder is essentially a partner, for the very word is a definition of partnership, and we have seen that it has been so held, and that a shareholder is liable accordingly. Nevertheless, we find that in the subsequent case of *Tredwen v. Bourne*, 6 M. & W. 461, (in which case a shareholder in a company was held to be liable for the ordinary dealings of such company, who had taken an interest in the concern,) Mr. Baron Parke says, that "if the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient." Lord Abinger, however appears to be of a different opinion, and puts the judgment simply on the point, "whether such companies do not ordinarily deal on credit; if they do, the shareholders are liable, unless by some evidence the party shows that in the particular case he is not liable." In other words, that the actual partnership alone suffices.

This view is so strongly supported, not only by other judgments, but by the law of partnership, that it must prevail over the judicial doubts which have occasionally been cast on this very important question. Shareholders and subscribers alike embark together in a concern of which they expect to share the profits or losses. They would thus be liable by the doctrine in *Dickenson v. Valpy*. They are liable as partners, wherever they have agreed unconditionally to become shareholders, and there are cases which settle the point. In *Ellis v. Schmæck*, 5 Bing. 521, which was an action for goods supplied to a (mining company), the defendant was held liable qua shareholder for all the goods that had been supplied from the first, and before he had taken any part by attending meetings, &c. In *Lawler v. Kershaw*, 1 M. & M. 93, in a similar action, one of the defendants was charged merely as a *shareholder, on the strength of having paid a [265] deposit when part of the goods had been supplied, though the deed of partnership had not been signed. The subsequent execution of the deed was held by Lord Tenterden, C. J., to be a good recognition of his former payment as a transaction connected with the partnership, and shows that in making it he considered himself as becoming a partner. In the recent case of *Beech v. Eyre*, 5 M. & G. 415, it was held that a defendant who signed an agreement in February for obtaining an act of parliament, and subscribed for shares, was liable for goods supplied to the company in July (although the deed of settlement was not executed until September) in virtue of the deed of contract in February. He had subsequently attended meetings, but the court held that he was a partner at the time when the goods

were supplied. "There was clearly evidence from which the jury might infer that he was from the first a shareholder in the company." See also the cases where subscribers were held disentitled to sue their committees on the score of partnership. (*Lucas v. Beach*, supra.) The cases with respect to dormant partners prove that the question of credit having been given to the *individual member* sued, is immaterial, if he be a partner, and not a question for the jury at all; and that the conclusion must prevail that it is law. A strange confusion is often made between those cases of actual partnership which alone constitutes liability, and those of quasi partnership. In the latter, the holding himself out as the person charged is essential to his liability, as we shall presently see; in the former case it is perfectly immaterial whether he holds himself out or not. In the case of *Gardiner v. Childs*, 8 Car. & Pay. 345, the very existence of the partnership of the defendant was unknown to the plaintiffs, and yet Lord Denman, C. J., said, in giving judgment,—"In my opinion the rule of law is this: if these defendants were partners in the publications at the time when the orders were given, they are liable for the things furnished to complete that publication, although Messrs. Westley and Davis were liable in the first instance. I can conceive that all the partners may not be *liable for all that is done [*266] by each individual partner, as in the case suggested by Mr. Justice Gibbs, but I think that in such cases there should be something exclusive in the nature of the transaction not only that they should not be known, but that the ordering of the goods should be the exclusive act of the particular partner. The question is, whether these accounts convince you that the partnership existed at the time when the goods were furnished; if they do, then the defendant will be liable." This judgment was afterwards confirmed by the full court.

In *Wintle v. Crowther*, 1 Cr. & Jer. 316, we have the authority of Bayley, B., to the same point: it having been pleaded that one of the defendants was a secret partner, and that the plaintiffs knew nothing of him, "We are of opinion," said that learned judge, "that where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached." *Beckham v. Drake* (supra.), is a strong authority also on the same point.

The above remarks apply to all trading companies. A fortiori are they applicable to railway and other companies, of which the object and functions are regulated by the Joint Stock Company Act.

Preliminary expenses are, as we have seen, prescribed and published. Not only are they authorized, but no one can become a subscriber without full knowledge that they must be incurred; he therefore assents to their being incurred, and to bear his share of them whether they answer his purpose or not.

Nor is this implied assent alone, for the subscriber also signs a deed by which he expressly covenants to the effect that "the managing directors shall take such proceedings as they in their discretion shall think fit, or as parliament shall require, &c., in the ensuing or any subsequent session or sessions of parliament, for incorporating, establishing and regulating the company, and authorizing the construction, &c., of all works incidental [*267] thereto, and for carrying out and effecting any of the herein-before mentioned objects, *or any part or parts, portion or portions thereof."

Nor do they stop there, for it is usual to insert what follows:—"That the parties hereto of the first part shall and will save, defend, and keep harmless and indemnify the said managing directors, and each and every member thereof, of and from all payment, loss or losses, costs, charges, damages, and expenses whatsoever, which such managing directors or any member thereof have or hath already incurred or become liable to in or in reference to the formation of the said intended railway, or the establishment of the company, &c., &c., in the exercise and execution of the powers and the authorities hereby vested in them or him as members or a member of such managing directors," &c.

The responsibility of shareholders therefore—thus clothed with all the attributes of partners, thus expressly authorizing and cognisant of the contracts of their agents the directors—is as perfectly within the pale of an actual partnership liability as it is possible to conceive a case to be.

But wherever, according to the rule we have ventured to state, the directors or managing body of a company, whether under the act or not, have exceeded their functions, or have failed to fulfil the terms or conditions upon which the shareholders subscribed, their responsibility ceases with the presumption of assent from which it sprung; for the liability of the principal is limited to the authority of the agent. It is well said in *Dickenson v. Valpy*, by Parke, J., that "an authority upon condition not fulfilled is no authority at all."

But even in this case where a shareholder would have been exempted from liability by such excess or laches on the part of the directors, if he afterwards recognise their authority, and acquiesce in their acts, he waives the discharge and his liability returns. In *Pitchford v. Davis*, 5 M. & W. 2, it was held that a subscriber is not liable unless the terms of the prospectus, if conditional, are fulfilled. Mr. Baron Parke said, "The defendant by

taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the *proposed capital obtained. The secretary who gives the orders to the tradesman is [268] the party primarily liable; the directors also who give the order to the secretary, may be liable. A third party (shareholder) may become liable if it can be shewn that he has authorized the act of the directors in making the contract. But by proving the defendant to be an original subscriber, unless the proposed capital is raised, no such authority is shewn."

According to the rule above laid down, we have now to consider the cases in which, though no actual or complete partnership exists, the party charged has thus authorized the acts of the managing body, and thus incurred liability. Here it is that the doctrine of holding oneself out takes effect, for it is on the ground of a *representation* of partnership to the creditor that the liability rests. Nor need the representation be direct. It has been held in *Diekenon v. Valpy*, that "he would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly, and in express terms that he was a partner." This representation must be to the *plaintiff*, and not to the world, for that is a loose expression," said Parke, J., "*under such circumstances of publicity, as to satisfy a jury that the plaintiff knew of it, and knew him to be a partner*;" and Mr. Justice Cresswell, in the recent case of *Wood v. the Duke of Argyll*, supra, strengthens this requirement, and renders the sufficiency of the representation conditional upon the fact, that "the plaintiff has acted upon the faith of such representations. It is not sufficient," he says, "to show that a party has held himself out as partner, unless it be also shewn that he has been so treated by the plaintiff who sues him." (6 M. & Gr. 932.) The sort of acts which amount to this can be best gathered from the cases decided on this point. For instance, in *Maudsley v. Le Blanc*, 2 Car. & Pay. 409, Bayley, J., held that, though there was no evidence that the defendant had, according to the terms of the prospectus, executed the deed, "he should take it for granted that he had done so: that he was liable as a partner, he was at the meetings of the directors *acting from time to time, and went to see [269] the works in progress; and therefore it was impossible to say he was not a partner." Attending meetings and taking any part as a promoter, without any question renders a man liable. See *Doubleday v. Muskett*, 7 Bing. 110, and that class of cases. And this principle has been carried further in a very recent case. In *Lake v. Duke of Argyll*, 6 Q. B. 477, it was held that the mere fact of the defendant having presided as chairman at a meeting at which the resolutions to employ the plaintiff were passed, was sufficient to make him liable, although he had taken no further part, though the company was not formed, and the directors not formally appointed. In *Fox v. Clifton* it is said, "where a person allows his name to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as partner:" neither does he divest himself of his anterior liability by simply ceasing to act. (See *Doubleday v. Muskett*.) See further instances in *Kedwelly Canal Company v. Raby*, 5 Price, 93, *Bell v. Francis*, 9 Car. & Pay. 66. They are not, however, liable for contracts made *before* they assented to act; not even if the company derive benefit from them after such assent. (See *Young v. Hunter*, 4 Taunt. 582.)

There does not appear to be any sound distinction in law between the position of a shareholder and that of a member of a provisional committee, or between the latter and a member of a managing committee, as regards their respective liability to the creditors of the company. They certainly cannot be held liable as *agents* if acting within the scope of their authority; their liability must consist either in being actually partners, or in holding themselves out as such; but so equally does the liability of a mere shareholder. The only difference in point of fact it, that they oftener perform acts which represent them as partners; but still it is submitted that the same conditions of liability which have been stated to apply to shareholders, attach equally to them. If they are shareholders or quasi partners, by holding themselves out as such they are on that account liable, but not as *committee men, inasmuch as no ex officio liability attaches to them. Two [270] *Nisi Prius* decisions (*Low v. Wilson*, and *Banks v. Goode*, 7 Law Times, 286), have recently started the novel doctrine that where there exists a managing committee, neither the provisional committee nor the shareholders are liable; but it is difficult to discover upon what authority these eccentric cases rest, certainly not upon that of *Fleming v. Hector*, 2 M. & W. 181, for there it was decided that the managing committee and not the members of a club were liable, where the committee had exceeded their limited authority; and it was also expressly ruled that the case was *not* analogous to a trading partnership, but was entirely a question of principal and agent. In the absence of any authority competent to overrule the current of cases decided in *banc*, it is submitted, that if a member of a provisional committee be not liable to the debts of the company, it is simply because he is not in the position of a partner, (a case not likely to occur frequently,) or being so, is exempted on the score of an excess of authority on the part of the managing body. Before the mere existence of a managing body can discharge all other members of a com-

pany from liability for debts contracted on their behalf, and by their authority, the law of partnership must be materially altered.

No member of a company can sue another; it has been therefore decided, as we have seen, that where actual services are performed for a company by one of its members, that he cannot recover at law. (*Holmes v. Higgins*, supra; *Goddard v. Hodges*, 1 Cr. & Mee. 33.) But where he becomes a partner subsequently to the work being done, he is not disentitled to recover. *Lucas v. Beach*, 1 M. & Gr. 417.

Allottees not being shareholders may sue or be sued at law, in the event of a breach of contract between them and the company; were the committee and allottees partners, of course no action would lie; but they are not. *Fox v. Clifton*, supra, however decides, that where a company is only proposed, and not actually formed, neither an application for shares, nor even a payment of the deposit, render the allottee a partner.

[*271] *Whenever the allottee has made an unconditional promise of subscribing, and the shares are allotted to him, without any stipulation by the company that they shall be forfeited on nonpayment of the deposit, the allottee is liable for his breach of contract. (See Ante, p. 93, note.) He is also liable in equity.

A person who has agreed to become a partner for a term of years, or upon any other defined terms,—not being a general partnership which might be immediately dissolved,—is compellable in equity specifically to perform his contract. That is well established by the cases of *Buxton v. Lister*, 3 Atkyns, 383; *Adderley v. Dixon*, 1 Sim. & Stu. 611; *Hibbert v. Hibbert*, Rolls Trin. T. 1807, cited in *Collyer on Partnership*, 2d edit. 133. And any misrepresentation or misconduct on the part of the projectors or managers of the scheme, or a material and unauthorized departure from its objects as described, would be a sufficient defence on the allottee's part to such a suit or action. It is not unlikely also that it would be alleged by the defendant that so many of the other allottees of shares, &c., had not paid their deposits, that the project must prove abortive. Any defence falling within the principle of *non in hæc fœderi veni* would suffice, but not, it is presumed, any which did not sustain a charge of misconduct on the part of the company itself. Allottees, who have been induced to take shares by false representations or misconduct of the company, may maintain an action to recover their deposits. (*Wontner v. Sharp*, 7 Law Times, 287, per Erle, J.; see also *Pitchford v. Davis*, supra.)

Companies derive powers of compelling the payment of calls by shareholders, from the acts or deeds of settlement by which they are constituted. Their power of enforcing these are, however, conditional, upon their having in the first place fulfilled their duties, and complied with the terms upon which the shares were allotted and taken. It is, for instance, often a condition precedent, that all the capital of the company shall have been subscribed, and that the shareholder shall have been an owner at the time of the call, also that due notice [*272] was given of it, and many other matters which arise out of the construction *put in each case on the terms of the act or deed. (See cases in *Aylesbury R. Company v. Mount*, 7 M. & Gr. 898; *Hutt v. Giles*, 12 M. & W. 492; *Sheffield and Manchester R. Company v. Woodcock*, 7 M. & W. 588; *Smith v. Goldsworthy*, 4 Q. B. 430; *Norwich and Lowestoff Navigation v. Theobald*, 1 Moo. & Mal. 151; *Miles v. Bough*, 3 Q. B. 845; *West London R. Company v. Bernard*, 3 Q. B. 873.)

Where no such impediment exists to the claim of the company, all new companies are empowered, by the 55 s. of 7 & 8 Vict. c. 110, to sue the defaulter in an action of debt, and similar powers are given to other companies for the recovery of the calls due. This forms an exception on this subject to the general rule that partners cannot sue each other.

In all other cases of claim between one member of the company upon another, or directors and shareholders, the remedy is exclusively to be sought in equity and not at law. Where, for instance, a sufficient case of misrepresentation or misconduct can be proved against directors or projectors of projects, subscribers will have no difficulty in recovering their deposits by a suit in equity. It must be observed, that the relief in cases of this class is founded strictly upon the jurisdiction the court of equity has in matter of *fraud*, and it will not be extended to unintentional mistake or erroneous judgment, not amounting to fraud or misconduct.

Where the funds have been mismanaged, or where the objects of the association having failed, the subscribed funds have not been applied or accounted for, the form of the bill must be for an account and application of the funds to the objects of the undertaking. It was at one time held that no decree for an account between partners could be made in equity, except upon a bill praying for a dissolution and general winding up of the partnership: and to *such* a suit it was and still is an inflexible rule that all the partners must be actual parties. Thus where the partners are as numerous as the subscribers to a railway project, it would be practically impossible to proceed with such a suit. A dissolution is, [*273] however no longer necessary for an account. The question came *under the consideration of Lord Cottenham, C. J., in *Wallworth v. Holt*, 4 Mylne & Craig, 619, who thus stated the principle upon which the courts of equity will give relief to part-

ners in companies under such circumstances. "The result, therefore, of these two rules would be,—the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it; that the door of this court would be shut in all cases in which the partners or share holders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to shew that such cannot be the law; for, as I have said upon other occasions, I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy." See also *Richardson v. Hastings*, 7 Beav. 323, where Lord Langdale says, "The court has even gone to this extent; in the case of an insolvent partnership not formally dissolved, it has permitted a bill to be filed by one or more on behalf of the rest against the governing body, to have the assets collected and applied, as far as they would go, towards the discharge of the debts; and that without seeking to ascertain the rights and liabilities of the parties as between themselves, and consequently leaving litigation as between those parties entirely open after the debts have been paid; that is, it has sanctioned a suit which sought nothing but to compel a satisfaction *pro tanto* of the partnership debts, as far as the deficient means would extend, and then have all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts, and also leave the partners liable, as amongst themselves, to such suits for contribution as the particular circumstances [*274] of the case might render necessary."

Wherever judgment has been enforced against any shareholder of a public company under 7 & 8 Vict. c. 110, he is entitled to contribution, as in ordinary cases of co-partnership. (See ss. 66 & 67.)

The transfer of shares is expressly legalized by the Act relating to companies requiring the sanction of parliament, and also by the Joint Stock Companies Act; cases therefore similar to those of *Duvergie v. Fellows*, 5 Bing. 248, and *Josephs v. Pebrer*, 3 B. & Cr. 638, are scarcely worth noticing.

Where shares are transferred, the transferee is usually clothed with the liabilities of the transferor; it is certainly implied in the contract of transfer that he shall; and where the company is incorporated by act of parliament, and the name of the scrip holder is entered in the company's books, it has been held that "the assignees hold the shares on the same conditions, and are subject to the same rules and orders, as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers," *Huddersfield Canal Company v. Buckley*, 7 T. R. 36, per Lord Kenyon, C. J., and the same rule is applied to recent companies in the case of the *London Grand Junction Railway Company v. Freeman*, 2 M. & Gr. 606, where it is laid down that "it was the manifest intention of the original subscriber that the holder of his scrip certificate should be treated as his assignee, and be registered accordingly as a shareholder. And we see nothing in the provisions of the act, or in any general principles of law, to prevent this intention from being carried into effect."

The mode and registration of transfers in railway companies are provided for by 8 Vict. c. 16, ss. 14 & 15. The only case in which any difficulty in determining the liability of companies and parties to transfers can well arise, is in that of the transfer of scrip before the company has obtained its act, and which we have seen is not rendered illegal as regards railway companies, by the 7 & 8 Vict. c. 110, s. 26.

Now where the subscriber has sold his scrip before incorporation, the company may refuse to register the scrip holder. The case of the *Kidwelly Canal Company v. Raby*, 2 Price, 93, seems to decide this point. There the act passed in June, 1812, [*275] and the subscribers' names were inserted, except the defendant's, but his name was omitted in consequence of his expressed wish, before the act was obtained, that his subscription should be withdrawn; but he was held bound to pay the calls, and it was ruled that he could not withdraw or escape from his liabilities as a share-holder without the formal consent of all the others.

Persons thus bound cannot discharge themselves by what, though a *legal sale*, is still an *unauthorized transfer* to some person between whom and the company and the trustees, there is no privity of contract. The directors may therefore refuse to register any but the subscriber, and they have a right to compel him to come in and register; for the transfer clause which regulates how shares shall be transferred after the act is obtained, enacts that *until* such transfer has been so delivered as aforesaid, the vendor of the share shall continue liable to the company for any calls," &c. Thus even upon a transfer after the act, *unless it be duly certified*, the original subscriber is liable, *a fortiori* is he liable when the transfer takes place before the act is passed.

This premature transfer of scrip is a barren contract. The vendor seldom undertakes

that the vendee shall be registered, and unless he does the latter has no remedy in the event of a refusal by the company to accept him, as in *Leeman v. Lloyd*, 14 Law Jour. Q. B. 165, where there was an express undertaking by the vendor. On the other hand the scrip-holder, it is submitted, cannot be compelled to register himself, for in the first place, he has contracted no liability to the company, and may, if he pleases, forego his claim, which in some cases it may be his interest to do. In this case the covenant between the company and the original subscriber must hold good, and the latter will be bound to fulfil it, and pay the calls, whether he is registered or not, according to the requirements of the 8 Vict. c. 16, s. 21. "That the several persons who have subscribed any money [*276] towards the undertaking, or their legal representatives respectively, shall *pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company." Neither, in the second place, does the scripholding vendee usually undertake to indemnify the vendor.

In equity an attempt was frustrated to obtain indemnity in a similar case. (*Jackson v. Cocker*, 4 Beavan, 59.) The Master of the Rolls observed, "This is called a purchase of shares when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law." In *Humble v. Langston*, 7 M. & W. 517, this case is distinguished from that of an original lessee compelled to pay damages incurred by a breach of covenant by the assignee of the lease. But if the company choose to register the scrip-holder, and he choose to be registered, and *if he be*, there is express authority, not only that he becomes liable qua shareholder for calls, &c., but that the original subscriber is discharged from such claims arising subsequently to the registration of the transfer, in the above cited case of the London Grand Junction Railway Company v. Freeman. The court having referred to the general and well-known usages with respect to these transfers, said, "Taking all these things into consideration, the court cannot doubt that all are made liable to pay calls, who, having before the passing of the act become entitled by the then well understood method of transfer, were afterwards registered as shareholders."

Even if the company refuse to register a mere scrip-holder, the subscriber can register himself and transfer to the scrip-holder, and thus defeat the refusal.

The various liabilities are provided for in the 8 Vict. c. 16; the 8th section of which makes every one a shareholder who has subscribed the required sum, "or shall *otherwise have become entitled to a share in the company*," and *who has been registered*. The 11th section of the same statute entitles the holder to a share in the certificate, which is evidence [*277] of his proprietorship. By section 14, the *shareholder may transfer all his interest in the capital stock and his "shares" to the transferee, who thereupon *de facto* becomes the "shareholder." The 15th section, as we have seen, enacts that *until* a transfer has been so delivered as required by the act, the vendor is liable. The conclusion is, therefore, that *after* it he ceases to be liable for calls; and sect. 23, makes the *shareholder* liable to pay the calls, and against shareholders, sect. 25, limits the remedy in default of payment. "If, at the time appointed by the company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such *shareholder* for the amount thereof."

The 26th section of the Joint Stock Companies Act, prevents any doubt as to the liabilities of sale of *scrip* in such companies, for it enacts that "with regard to subscribers, and every person entitled, or claiming to be entitled, to any share in any joint stock company, the formation of which shall be commenced after the 1st day of November, 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that *every contract* for, or sale or disposal of such share or interest *shall be void*, and that every person entering into such contract shall forfeit a sum not exceeding 10*l*."

The transfer of *shares* after complete registration, is thus provided for by section 54: "It shall be lawful for every shareholder of such company, and he is hereby entitled, to sell and transfer his shares therein by deed duly stamped, in which the full amount of the pecuniary consideration for such sale shall be truly expressed, and which instrument of transfer must be according to the form in the schedule (K) to this act annexed, or to the like effect; and that the directors of the company shall cause a memorial of such instrument of transfer, when produced at the office of the company, to be entered in a book to [*278] be called 'The Register of Transfers,' and the entry thereof *to be endorsed on the instrument of transfer." All calls are to be paid previous to transfer, and subsequently the transferee is alone liable.

The 9 & 10 Vict. c. 28, facilitates the dissolution of railway companies, but dissolution is not to affect the rights of creditors, (s. 25,) or the settlement of liabilities.

The original liability of the shareholder to creditors and third parties, for all contracts made up to the time of the registered transfer of his interest, clearly remains. It is governed entirely by the same law as that of retiring partners, which has been already fully explained. Wherever any original shareholder has reason to believe that any credit has been given to the company on his account, or by parties who have a particular knowledge of his connexion with the company, it will be prudent to give such parties express notice of its termination.

This brief outline of the law of public companies, as far as it affects contracts by and with them, will be found to embrace the general principles of the law applied to cases most likely to arise, and of which the solution promises to be of practical or frequent use.

*LECTURE X.

[*279]

PRINCIPAL AND AGENT.—THEIR RESPECTIVE LIABILITIES.—AGENCY OF WIVES FOR THEIR HUSBANDS.—RECAPITULATIONS.—REMEDIES BY ACTION. STATUTES OF LIMITATION.

Pursuing the consideration of the points arising upon contracts made through the medium of agents, and having disposed of those which relate to the liability of the principal upon them, the next in order is that which regards his power to take advantage of them. Now, where the agent, when he makes the contracts, states who his principal is, and states that he is contracting on the behalf of that principal; or where (though there may be no express statement to that effect) the circumstances of the transaction can be shewn to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal; in such cases there can of course be no doubt of the principal's right to take advantage of it, and enforce it to the fullest extent. It is, in truth, as if he had put his own hand to it. In such cases, therefore, there can *be no difficulty. But the cases in which [*280] difficulties arise, are those in which the agent, being really only the substitute for another, nevertheless contracts in his own name as if he were himself the principal.

Now, in such a case, the principal may adopt and enforce the contract, but his right to do so is subject to a qualification which has been dictated by common sense and public convenience, namely, that, on declaring himself, he stands in the place of the agent who made it, so that the other contracting party enjoys the same rights against him which he would have enjoyed against the agent who made it, had that agent really been the principal. For instance, if I buy a parcel of goods from A., who sells them to me in his own name though he is really only the factor of B., whose property the goods really are; B. may, if he think proper, declare himself the principal, and require me to pay the price to him, but if the factor owed me money which I could have set off against the price had the factor sued me for it, I have the right of setting it off against B. in like manner, as I might have done against the factor. And the good sense and justice of this is obvious; for it may be exceedingly inconvenient, indeed ruinous to me, to pay in hard cash; and my knowledge that I should have this set-off may have

been my only inducement to buy, and if I were deprived of it, I should be led into a trap, induced *to purchase upon one ground, and forced [*281] to pay upon a different one.

The general rule that a principal may declare himself, and take advantage of his agent's contract made without naming him, and this qualification of it (to prevent the injustice of which it might otherwise be made the instrument), are both very clearly laid down in the judgment in *Sims v. Bond*, 5 B. & Adol. 393. "It is a well-established rule of law," said the L. C. Justice, delivering the judgment of the court in that case, "that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure as if the agent had been the contracting party." See further *George v. Clagett*, 7 T. R. 359, *Carr v. Hinchcliffe*, 4 B. & C. 551, and *Warner v. M-Kay*, 1 Mee. & Welsb. 595.

Before leaving this subject, I will say one word with regard to the situation of an agent who contracts in the manner I have just mentioned, without naming his principal. It is settled that, in such a case, the other contracting party may, when he discovers the true state of facts, elect to charge either him or his principal, whichever he may think most for his advantage; and that he may do the same where the agent, at the time of making [*282] the contract, says that he *has a principal, but declines to say who that principal is. (a)

But there is this qualification to the right of election, namely, that, if the state of accounts between the agent and principal have been altered, so that the principal would be subjected to a loss by the other contracting parties' election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name. Now B., when he discovers me to be the real principal, may elect whether he will treat me or my agent A. as his debtor. But if, in the mean time, I have paid A., he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, namely, that the principal cannot, by prematurely settling with his agent, deprive the other contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, but not for ready money, but at three months' credit. A. [*283] purchases in his own *name from B. B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, "you are too late; I have settled with A. my agent." The answer would be, "You had no occasion to do so pending the time of credit; and you cannot by doing so deprive B. of his right to elect you as his debtor." You will see all these distinctions laid down in three cases, *Paterson v. Gandassequi*, 15

(a) The right to sue the principal when disclosed does not apply to bills of exchange accepted or endorsed by the agent in his own name alone, and not *per proc.*, for by the law of merchants, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. See *Beckham v. Drake*, 9 M. & W. 92, per Lord Abinger, C. B.

East, 62, *Thompson v. Davenport*, 9 B. & C. 78, and *Rymer v. Sawer-cropp*, 1 Campb. 109.(a)

*Before leaving the subject of contracts by agents, I will advert to the topic which in a former lecture I reserved for this period that [284] namely of a wife's power to bind her husband by contract. Now it is a principle as old as the time of Fitzherbert that, wherever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent. Now that she may be appointed his *agent in the same way that any other individual may, either by express words, or by implication, I have already mentioned; and [285] you will find that illustrated by the late case of *McGeorge v. Egan*, 5 Bingh. N. Ca. 196. I am not, however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, inasmuch as it may be conferred on any one else; but of another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessities suitable to his fortune and rank in life. This is very clearly explained by Lord Holt, in *Ethrington v. Parot*, L. Raym. 1006, *Waithman v. Wakefield*, 1 Camp. 120. But then this must be taken subject to two observations: first, that the contract must be for *necessaries*; secondly, that the party making it must not have been forbidden to trust her.

Now, with regard to the question what are necessities, it is a question

(a) The cases in which an agent is personally liable, and may be sued on the contract he makes, may be thus classed:—

In the first place, he is liable, according to the doctrine in *Thompson v. Davenport*, where the principal was not disclosed at the time of the contract, but if he were known, and credit were given to *him* at the time, the agent cannot be afterwards sued, provided he acted within the scope of his authority.

In the second place, the agent is liable, as we have already stated, where he exceeds his authority, or represents himself to have an authority which he has not, the want of authority being unknown to the other party; *Jones v. Downman*, 4 Q. B. 235; for in such cases the creditor has no remedy against the principal; *Wilson v. Barthrop*, 2 M. & W. 863. Here again, however, arises the question, as we have seen, how far *Smout v. Ilbery* (supra) is good law, and that the agent is to be held liable where it cannot be proved that he fraudulently misrepresented his authority. But that case clearly decides another very important point, namely, that where a man has been in the habit of dealing with the plaintiff for household goods, the wife is not liable for such as are supplied to her after his death, but before information of his death had been received, she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.

In the third place, an agent is liable for himself and his heirs under seal for the act of the principal, though he describe himself in the deed as covenanting for and on behalf of such other person. *Hancock v. Hodgson*, 4 Bing. 269; *Appleton v. Binks*, 5 East, 148.

An agent is liable, in the fourth place, where he contracts in writing in his own name, unless it appear on the face of the contract that he did so only as an agent; otherwise he will not be allowed to give parol proof that he contracted as agent so as to relieve himself from responsibility. But parol evidence may nevertheless be given to charge an unknown principal, as it does not deny that the contract is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal. *Higgins v. Senior*, 8 M. & W. 814, per Parke, B. See also *Jones v. Littledale*, 1 N. & P. 697. *Magee v. Atkinson*, 2 M. & W. 440.

which always and obviously depends upon the circumstances of the particular case under discussion for the time being. It is one which is continually arising, and of which there are many reported examples (see *Hunt v. De Blaquiére*, 5 Bingh. 550, *Clifford v. Layton, M. & M.* 101;) but the cases [*286] most frequently referred to on the subject are *Montague v. Benedict*, 3 B. & C. 631, and *Seaton v. Benedict*, 5 Bingh. 28. The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakspeare called *Much ado about Nothing*, in which one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman, and it was sought in *Seaton v. Benedict* to charge him with a bill contracted by the lady for articles of millinery of a very expensive description. It appeared at the trial that she was already supplied with all necessary articles of dress; and the Court held, on a motion for a new trial, that the defendant was in point of law entitled to a verdict.

In the other case of *Montague v. Benedict*, the goods supplied were articles of jewellery to the amount of 83*l.*, which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was 200*l.* a-year, and that the lady had a fortune of 4000*l.*; the defendant's, that the lady was already supplied with sufficient jewellery. The jury found a verdict for the plaintiff; but the Court set it aside, on the ground that there was no evidence to support it. Mr. J. Bayley said,—

"If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then, although she has her remedy in the [*287] Ecclesiastical Court, yet she is at liberty to pledge the credit of her husband for what is strictly necessary to her own support. But, whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorized."(a)

These observations of Mr. J. Bayley support the latter of the two observations to which I adverted, namely, that the contract must not only be for necessities suitable to the husband's fortune and degree, but that the person [*288] making it must not have been forbidden to contract with the wife on his account.

This point, indeed, had been decided long before by the majority of the judges in the Exchequer Chamber in a case of *Manby v. Scott*, 1 Lev. 4, 1

(a) The agent's authority is determinable either by revocation, by the discharge of his particular functions, or by the death of his principal, as in the case of *Smout v. Ilbery*, where the creditor was rendered remediless, as against the agent, (for the principal was known, and also against his successor; though Pothier says:—"Although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of the agent." Upon which, Evans thus comments:—"I do not think this decision would be admitted by the courts in *England*. If the contract is enforced it must be either as the act of the party deceased, or of his executor. The first supposition is absurd, and the other imputes to the executor an assent which he has not given; and which, if he does give, induces a personal obligation against himself."

Siderfin, 109. The discussions in this case were exceedingly long and elaborate ; and, as frequently happens in the old reports, the reasons given in some instances almost ludicrous : for instance, Mr. Justice Twisden, who was at first of opinion that it was not in the husband's power to prohibit another from trusting his wife for necessities, gave as a reason that, if he might prohibit one person, he might go on doing so, till he had at last prohibited every one in England ; and then, says he, if he were to join the king's enemies his wife must go too, and then she would be hanged ; or stay at home, and then she would be starved, which he remarked would be inconvenient. However, the majority of the Court were of opinion, that the husband may prohibit a particular person from trusting his wife even for necessities, and that, if he trust her in defiance of that prohibition, he cannot hold the husband liable.

The points which we have been hitherto considering all arise in cases in which the husband and wife continue to live together. But if the wife, when she makes the contract, is living separated from her husband, the case is quite different ; and the only question is, whether the *separation [*289] is with the husband's assent, or produced by the husband's misconduct. If the husband drive his wife from home, or if he so misconduct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. "If a man," said Lord Eldon, in *Rawlins v. Vandyke*, 3 Esp. 251, "will not receive his wife into his house, or turns her out of doors, he sends her with credit for her reasonable expenses."—"Where a wife's situation in her husband's house," says Lord Kenyon, in *Hodges v. Hodges*, 1 Esp. 441, "is rendered unsafe, from his cruelty and ill-treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessities furnished to her under those circumstances." See *Honliston v. Smyth*, 3 Bing. 127 ; *Boulton v. Prentice*, Str. 1214.

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues ; *Hodgkinson v. Fletcher*, 4 Camp. 70 ; *Nurse v. Craig*, 2 N. R. 148. But in those cases in which the wife, living apart from her husband, has authority to bind him by contracts for *necessaries, if he allow and pay her a sufficient maintenance the authority is gone, and her contracts, even for necessities, will not [*290] bind him ; the reason of which is, that the authority is gone by law for the wife's protection, to save her from distress occasioned by her husband's misconduct ; but if he make her a proper allowance, and pay it, there is no such danger ; and then *cessante ratione cessat lex* ; see *Morin v. Peck*, 3 Mee. & Welsb. 481, which is the last case on his subject, and in which the Exchequer decided that it makes no difference, that the tradesman, when he trusts the wife, has no notice that her husband makes her an adequate allowance.

Thus you see that if the wife be driven from home by the husband's misconduct, or if they separate by mutual consent, she carries with her an implied authority to pledge his credit, so long as that separation continues, unless he pay her an allowance adequate to her support and his own means.

But, when the separation is occasioned neither by his misconduct nor consent, the case is otherwise. In such case she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril. See *Hardie v. Grant*, 8 C. & P. 512; *Morris v. Martin*, Str. 647. And, where a married woman is found living apart from her husband, the *prima facie* presumption is that it is neither in consequence of his improper [*291] conduct or by his assent, and therefore, it always *lies on the person who gave her credit to show what were the circumstances under which they separated. See *Reed v. Moore*, 5 C. & P. 200; *Mainwaring v. Leslie*, M. & M. 18.

It only remains to observe that, where the wife, in consequence of the circumstances under which she separated from her husband, has authority to bind him by contract, those contracts must be for necessities suitable to his rank and means. What *are* such necessities, is a question which of course turns on the particular circumstances of each case (see *Hunt v. De Blaquiére*, *Ewers v. Huuton*, 3 Esp. 255.) There are two of the latest cases involving rather singular questions, *Turner v. Rookes*, 10 A. & E. 47, and *Grindell v. Godmond*, 5 A. & E. 755. In *Turner v. Rookes* the husband and wife were living separate by consent, under a deed of separation, by which she had a separate maintenance of 112*l.* a year; so that as long as that was paid she would have no authority to bind the husband for necessities of an ordinary description; but it appeared that the husband had used threats of violence towards her, which occasioned her so much alarm that she thought it necessary to exhibit articles of the peace against him. In order to do this, she was obliged to employ an attorney, and not being able to pay his bill of costs, he brought his action to recover it against the husband. The Court held that the proceeding was necessary for the [*292] wife's safety, and *therefore that she had a right to bind the husband by contracting for it, and that though the maintenance allowed her might be sufficient for ordinary purposes, yet that this was an extraordinary contingency not likely to have been contemplated in arranging the amount of maintenance, and which therefore was not covered by it; and they held the husband liable as having through his wife employed the attorney to exhibit articles of peace against himself.

The other case was one in which the husband had assaulted and ill-treated his wife, who preferred an indictment against him at the Beverley sessions. Upon which he was convicted, and sentenced to twelve months' imprisonment, and a fine of 50*l.*; the attorney who conducted the prosecution thinking, very correctly, that if he carried it on without funds, he would have no remedy against any one, required money in hand, which the lady borrowed from her brother, and he brought an action against the husband to be reimbursed. But the Court thought that, though it might be necessary that she should exhibit articles of peace for her own personal security, yet that it could not be necessary that she should assume the offensive, and prefer an indictment against him, and consequently that the plaintiff was not entitled to recover.(a)

(a) What are necessary things for a wife is a question which, as well as the analogous one of what are necessary things for an infant, have often been the occasion of doubt and litigation. In *Peters v. Fleming*, 6 M. & W. 42, Rolfe, B. says:—"I think the explana-

*The whole of the branch of the law may be shortly summed up thus :—while a wife continues to live with her husband, the pre- [293] sumption is that she has authority to bind him by contracting for necessaries. But that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no authority ; but that presumption also is subject to be rebutted by showing that the separation was by consent, or occasioned by the husband's misconduct ; in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessaries.(a)

tion given by my brother Alderson is the best that can be given ; viz., that that is necessary which is *bona fide* purchased for use and not for ornament, and which consorts with the condition and rank in life in which the party moves. And Alderson, B., in the course of the argument in the same case says :—"The term 'necessaries,' as applied to dress, may mean those things without which the party would lose caste in society ; and he lays down the true test as being, whether the articles were obtained for *real use*, being also suitable to the condition and degree of an infant." In *Chapple v. Cooper*, as we have already seen, this point was incidentally discussed. (See page 206, n.)

(a) The contracts upon which assignees of bankrupts and personal representatives of deceased persons are liable, are governed by the general law of contracts, and the peculiarities which attend them belong to the laws regulating their functions, and are not properly within the province of a work on contracts. It is sufficient, therefore, to remark briefly that no action will lie in the name of a bankrupt, as the Bankrupt Act vests in the assignees absolutely all contracts, whether executed or executory, made by him, and in which he was beneficially interested at the time of the fiat. These contracts being actually vested in the assignees, actions *ex contractu* must not be brought in the bankrupt's name, even with the consent of the assignees, but in that of the assignees themselves, for if brought in the name of the bankrupt the defendant may plead the bankruptcy in bar of the plaintiff. The assignees have the power of enforcing a contract broken subsequently to the bankruptcy, but entered into by the bankrupt before the bankruptcy, and also of suing for work done by the bankrupt for them subsequently. *Whitmore v. Gilmour*, 12 M. & W. 808. It is unnecessary that they should give notice of their intention of adopting this contract, being only obliged to perform the conditions precedent, which the bankrupt himself must have done. *Gibson v. Carruthers*, 8 M. & W. 321. The assignees have only contracts and property vested in them, in which the bankrupt was beneficially interested at the time of the fiat ; therefore any property of which the bankrupt was only a trustee, and in which, at the time, he had no such interest, would not pass, he not being the reputed owner of it, and any action appertaining to such property must not be brought in the name of the assignees, they having no interest in it, but in that of the bankrupt ; otherwise where the bankrupt had any such interest at the time of the fiat. The bankrupt may sue in his own name on causes of action *ex contractu* accruing to him between the issuing of the fiat and the grant of the certificate, where he acquires any property or enters into any contract, unless the assignees interfere, the bankrupt's title being good against every one but the assignees, as such causes of action and property are not vested absolutely in the assignees, unless they claim them. After the creditors have been paid in full, the bankrupt has a right to and may sue for all debts which remain. Assignees are not compelled to sue as assignees, upon any contracts made by them which relate to the estate of the bankrupt after the bankruptcy, but they have the power of suing thereon as assignees if they choose.

All debts and claims against the bankrupt are barred by the certificate, whether proved or such as might have been proved under the fiat, and so are any consequential damages arising from the non-payment thereof. Unliquidated damages not ascertained at the time of the fiat cannot be proved, even though they be founded on a contract.

Executors or administrators are liable to be sued upon the contracts of the testator to the extent of the assets in their hands (see 3 & 4 W. 4, c. 42, s. 14) ; and they may sue and be sued in their representative capacity alike on personal contracts, and for injuries done to the real estate of the testator. But the representative is never personally liable unless he has rendered himself so by some note in writing under the Statute of Frauds, as we have seen under that head. It is also requisite that there should be a valid consideration for such promise, as in all other contracts. (See ante, p. 88, et seq.) The liability of the executor *de bonis propriis* has been much discussed in the cases where he is sued for rent, accruing during his own time in his representative character, and likewise in his individual capacity as assignee of the term. (See *Rubery v. Stevens*, 4 B. & Ad. 211, and 1 Wms. Saund. 111 a, note c, where the cases are cited and the law explained.)

[*294-*295] *I have gone through the subject which I proposed at the commencement of these lectures *with the exception of the last point. I have mentioned the different sorts of contracts, [*296] the *peculiarities of those by record, by writing sealed and delivered, and writing not under seal; of the consideration which a simple contract requires to support it; of the effect of illegality whether by common or statute law, in invalidating contracts; of the competency of the parties, and of the rules which govern contracts entered into by those parties through the medium of agents.

It remains to point out, in a few words, the *remedies* by which the observance of contracts may be enforced, and their non-observance punished. Now I say nothing about the remedy in Courts of Equity. *There* a specific performance may, as you know, in many cases be compelled; there is no such thing as a specific performance to be had in a court of law, except in [*297] the cases to which the writ of mandamus is applicable, which can, however, never be *obtained when there is any other remedy. The remedy in a court of law for breach of contract is by *action*, and there are distinct forms of action applicable to the breach of distinct species of contract.

If the contract be by record, the remedy is by writ of *scire facias*, which lies only upon a record, and which has obtained its name from the Latin words it formerly contained commanding the sheriff to make the defendant know that the court commanded his appearance to answer why execution should not issue against him. (a)

If the record create a debt, render a sum certain payable by the one party to the other, an action of debt will lie to enforce payment, if the plaintiff prefer the form of proceeding to a *scire facias*.

The action of debt lies in every case where there is a liquidated pecuniary duty from one *person to another, (b) and it is frequently found [*298] an extremely useful form of action; for suppose A. have three

The cases in which an executor incurs a personal liability on contracts made by him in that capacity, are cited and reviewed, *Comer v. Shawe*, 3 M. & W. 355. See also *Waite v. Gale*, 14 Law Journ. Q. B. 212.

It is an established rule, that the executor or administrator may sue wherever the money to be recovered will be assets, whether as contracts accruing in the testator's lifetime, or made by them, *Heath v. Chelton*, 12 M. & W. 632, such as the representatives entered into in completing the testator's contracts, or for money paid by him as executor, or on an account stated by him, or for goods sold by him or for the testator since his death, if the contract is ratified by his personal representative, and this is equally so when an administrator is not in office till after the debt is incurred by some third party, for when one means to act as agent for another, a subsequent ratification is equivalent to a prior command; nor is it any objection that the intended principal was unknown to the person who intended to be the agent. (*Foster v. Bates*, 12 M. & W. 226. See also *Ricketts v. Weaver*, 12 M. & W. 718.)

(a) It is used for a variety of purposes, but perhaps one of the most common to which it is applied, is to revive a judgment after it has become extinct; for all writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct, yet, however, it will grant this writ of *scire facias*, which states the judgment recovered by the plaintiff, and that execution still remains to be had, and commands the sheriff to *make known* to the defendant, that he be in court at the return day, in order to show why the plaintiff ought not to have execution against him. See *Holthouse's Law Dictionary*, 2d edition, 363.)

(b) That is to say, for a sum definite, or debt *eo nomine* and *in numero*. Thus it lies on an award for the money awarded (see 2 Wms. Saund. 62 b, note 5); for calls of shares upon bills between the immediate parties, as, for instance, between indorsee and his indor-

separate demands against B., one *on a judgment, one upon a bond, [*299] and one upon a promissory note. If it were not for this peculiarity of the action of debt, he would be obliged to sue for these demands in three distinct actions, whereas he may unite them all in a single action of debt.

If the contract be by deed, the remedy is by action of covenant, which lies to enforce a contract by deed, and to enforce that only unless the contract be for payment of a liquidated sum, in which case, as I have already said, the plaintiff may, if he prefer it, maintain an action of debt. If the contract be neither by record nor by deed,—if, in other words, it be a simple contract either reduced to writing, or by mere words without writing,—the remedy, unless it be for payment of money, in which case debt also will lie, is by an action of *assumpsit*, or as it is now more often perhaps called, an action on promises. (a) This was originally a sort of action *of tres- [*300] pass upon case, and was called *assumpsit* from the words undertook

ser, but not between indorsee and acceptor, or indorsee and a distant indorser, or between indorsee and drawer, for in such case there is no privity of contract. (Lewin v. Edwards, 9 M. & W. 720.) Neither will it lie on notes payable by instalments until all are due, though *assumpsit* will. (2 Wms. Saund. 303 a, note 9.)

Debt lies on all the common counts; such as goods sold, work and labour, money lent, for use and occupation, &c., even though there is an express demise if there be no deed, and for interest of money, without alleging any special contract. (1 Wms. Saunders, 201, note a.)

It lies on specialties to recover a money demand secured thereon; such as demises by deed for rent, money bonds, policies of insurance, mortgage deeds, &c.; and also where no money payment is secured by the mortgage, if there be a parol contract to which the security is collateral. (Yates v. Aston, 4 Q. B. 182. See also Baber v. Harris, 9 A. & E. 532.) It lies also on all unsatisfied judgments, whether of superior or inferior courts, even if not of record. (Jones v. Jones, 5 M. & W. 523;) and of county courts, Williams v. Jones, 13 M. & W. 628; and on those of foreign courts and Scotch decrees, where a specific sum is recovered. See Robinson v. Bland, per Lord Mansfield, 2 Burr. 1077, and Russell v. Smyth, 9 M. & W. 810. And debt lies for all penalties given of sums made recoverable by statute, unless otherwise directed.

This action is brought to recover the specific debt due, and not for damages, except for those fictitiously arising from the detention of the debt.

(a) *Assumpsit* lies in very many cases concurrently with debt, and is brought both upon express promises and in all cases where the law implies a promise from an obligation; *damages* for the breach of which are the sole object of this action. *Assumpsit*, therefore, lies on all the common counts concurrently with debt, and upon every kind of simple contract, express or implied, but on no specialty. It lies, however, on bills of exchange, promissory notes, for rent, or parol demises, but not for rent on leases by deed. Agreements for a deed may, before the deed is executed, form the subject of an action of *assumpsit*, but not where the agreement is merged in a deed subsequently executed. (Filmer v. Burby, 2 M. & Gr. 529.) *Assumpsit* lies also against a sheriff to recover money received under a *fieri facias*. So physicians and counsel may maintain it to recover fees expressly promised: and it lies against a factor or an agent refusing to account, and in all merchants' accounts for the balance due, however numerous the items. It lies also for breach of contract, not under seal by the vendor and vendee, on the sale of real property, or for the non-delivery of goods and chattels sold, or for the non-performance of any contract. It is the only remedy for breach of warranty. It lies also in case of mismanagement of farms, and generally for all acts of nonfeasance.

It is often a question in cases of tortious breach of contract, whether to bring an action of *assumpsit* for the breach of promise, or an action upon the case for the tort. It has been laid down, that wherever the cause of action is such that it can best be explained by circumstantial declaration, the action should be in case rather than in *assumpsit*, as it affords better means of doing this. In more recent cases this distinction seems to have been disregarded; and it has been held that actions of this kind may be brought indifferently in case or *assumpsit*. In Boorman v. Brown, 11 Cl. & Fin. 1, (where a broker had delivered goods on sale without payment against the instruction given him,) the judgment of the Exchequer Chamber (3 Q. B. 525,) was upheld, in which Tindal, C. J. said, "There is a large class of cases in which the foundation of the action springs out of

[*301-*302] and promised, which *always appeared in the declaration. When the uniformity of process act was passed, the *schedule contained a form of writ in which it was described as an action on promises; in consequence of this it has ceased to be considered a species of the action of trespass on the case, and indeed it would now be improper to describe it as such; it is now most properly denominated *an action on promises*, and is the great remedy upon the breach of simple contract.

There is, besides, a sort of action called an *account*, which was for a long time almost completely obsolete and disused, but within the last few months has risen again into some little importance in consequence of a decision of the Court of Exchequer, which I will presently mention. (a)

privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship-owners on the bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff: and, as to the objection, that this election is only given where the plaintiff sues for a misfeasance, and not for a nonfeasance, it may be answered, that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract, as in the ordinary instance of case against shipowners, simply for not safely and securely delivering goods according to their bill of lading; and as in the case of *Coggs v. Bernard*, 2 Ld. Raym. 909, where an undertaking is stated in the declaration as the ground of action; and to give no further instance, the case of *Marzetti v. Williams*, 1 B. & Ad. 415, where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

"The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."

In the case of *Russell v. Bell*, 10 M. & W. 340, after a bankruptcy, 85 bundles of yarn, of the value of 114*l.*, were delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be *bought* by the defendants of the bankrupt, and it was held that where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit. "Here," said Lord Abinger, "the bankrupt is selling goods under false colours, in order to cover transactions he knew he could not otherwise cover, and has no right to set up his own fraudulent contract. But the action being brought for goods sold and delivered by the assignees, and not by the bankrupt, the assignees have a right to waive the tort, and bring an action of assumpsit for goods sold and delivered."

(a) The case here alluded to is that of *Inglis v. Haigh*, 8 M. & W. 769. See post, p. 315. There must be either a privity in deed by the consent of the party, or a privity in law, as in the case of a guardian, in order to maintain an action of account. By statute 4 Ann. c. 16, s. 27, an action of account may be maintained by one joint-tenant, or tenant in common, his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion; and against the executors or administrators of such joint tenant or tenant in common. It is broadly laid down in Selwyn's *Nisi Prius*, vol. i. p. 3, that where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account, not of assumpsit; "but this is not so; an action of account resembles a bill in equity for enforcing the execution of a trust. The first judgment is, that the defendant do account, which is commonly called a judgment *quod computet*; whereupon, the defendant offering to account, the court assigns

*Now, these being the remedies by which contracts are enforced in courts of law, the next question (a) is, as to the *time* within [*303] which those remedies are to be pursued ; and those times depend upon the provisions of the acts of parliament which we call *Statutes of Limitation*.

*The policy of the legislature in enacting such statutes, and thereby constituting a time after the lapse of which engagements [*304] shall be no longer capable of being enforced, has always been considered unexceptionable.

When you find a debt or an engagement existing after the lapse of a long period of time, it is possible, indeed, that strict justice may require its enforcement, but is also possible that great injustice may be done by enforcing it. Suppose, for instance, an executor finds a bond forty years old in his testator's repository, it may be that the principal and interest are due and unpaid, but it may also be that they have been paid, or that great part has been paid, and that the vouchers have been lost ; or it may be that the bond was deposited with the testator as a collateral security, and that no liability ever in reality accrued upon it, but that the obligee forgot to reclaim it or died pending the suretyship, leaving his representatives in ignorance of the transaction. It may be quite impossible after the lapse of forty years to prove this. Indeed it may be in the knowledge of no person living. Now there would be the greatest hardship in calling upon a man after the lapse of an indefinite space of time to defend himself against such a demand, but there is no great hardship imposed on the obligee by requiring him to enforce his claim within a reasonable time if he intend to enforce it at all.

This, then, is the policy of the statutes of Limitation—to *pre-vent obsolete claims from being raked up. And now as to the time [*305] which the legislature has appointed for the purpose of pursuing the several remedies of which I have spoken.

With regard to *scire facias*, there was, for a long while, no limitation imposed by statute to the commencement of that proceeding ; but now, by 3 & 4 W. 4, cap. 42, sect. 3, a *scire facias* on a recognizance must be sued out within twenty years. (b)

An action of debt founded upon a contract made by deed was also not till very lately subject to any limitation in respect of the time within which it might be commenced : not that you are to suppose that there was *practically* no security against an obsolete claim founded on a deed, for the courts

auditors to take and declare the accounts between the parties ; and then the final judgment is that the plaintiff do recover against the defendant so much as the latter is found to be in arrear." Neither in Selwyn nor in Buller is there a reference to any case where this action has been held to lie as between merchant and merchant. (Cottam v. Partridge, 4 M. & Gr. 271.)

This action neither lies against infants nor one executor against another. The first judgment, *quod computet*, is interlocutory, and not definite : the defendant then usually offers to account, and the court assigns auditors, who are usually prothonotaries. (See Godfrey v. Saunders, C. B. 3 Wils. 73.) The final judgment is that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear. A writ of error lies upon this last judgment only.

(a) The remedies on each class of contract will be further noticed in treating of the subject-matter of contracts. (See APPENDIX.)

(b) Where an old judgment exists, a *scire facias* to revive it creates new rights, and the statute runs from it. Farrell v. Gleason, 11 Cl. & Fin. 702.

had introduced a presumption that such claims were satisfied after the lapse of twenty years ; and if no evidence of any acknowledgment of the existence of the claim appeared to have taken place that time, they recommended the jury to presume payment or a release as the nature of the case happened to require ; but there was no statute which could be pleaded in bar [*306] of such action until the *3 & 4 W. 4, c. 42, the third section of which established the limitation of twenty years.(a)

The action of *covenant* is liable to the same observations as the action of debt founded on a deed ; the same section of 3 & 4 W. 4, c. 42, has applied the limitation of twenty years to it also.(b)

[*307] *Now from these limitations thus introduced by 3 & 4 W. 4, c. 43, there are certain excepted cases.

In the first place, by the fourth section of the act, if the person entitled to bring the action be an infant, a married woman, an insane person, or beyond the seas at the time when the right of action accrues, the time runs not from the accrual of the right of action, but from the removal of disability as it is called.

In the second place, if the defendant be beyond seas, the time runs from his return ; that is also by the act.

[*308] In the third place, if an acknowledgment of the liability be given in writing, signed by the person liable or his agent, the time runs from the date of that acknowledgment. This is by section 5.

In the fourth place, if there have been a part payment, either of principal or interest, time runs from such payment. This is also by sec. 5.

In the fifth place, if an action have been brought and the defendant out-

(a) Sect. 3 enacts, "That all actions of debt for *rent upon an indenture of demise*, all actions of *covenant or debt upon any bond or other specialty*, and all actions of debt or *scire facias* upon any *recognizance*, and also all actions of debt upon any *award* where the submission is not by specialty, or for any *fine* due in respect to any copyhold estates, or for an *escape*, or for *money levied on any fieri facias* ; and all actions for any penalties, damages, or sums of money given to the *party grieved*, by any statute now or hereafter to be in force, that shall be used or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after ; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, *within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after.*"

It is necessary in pleading this statute, to allege that there has been *no* breach of the condition of such bond within the time limited. (*Sanders v. Coward*, 13 M. & W. 65.)

(b) The statute 3 & 4 W. 4, c. 27, (Real Property Limitation Act) s. 2, enacts that "no person shall make an entry, or distress, or bring an action to recover any land or *rent*, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person through whom he claims," &c. This section has no reference to rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation ; but must be confined to rents existing as an inheritance distinct from the land, and for which, before the statute, the party entitled might have had an *assise*, such as ancient rent service, fee-farm rents, or the like. "Recover" means "to obtain possession of or seisin of ;" and "rent" means such rent as might in its nature have been the object of such recovery, and does not include rent reserved on common leases for years ; see *Grant v. Ellis*, 9 M. & W. 113 ; for a person entitled to it has no estate in the rent, but only as an incident to the reversion ; *Prescot v. Boucher*, 3 B. & Adol. 849. But it applies to rent, the right to which is derived under a will. 3 Bing. N. C. 544. Debt for arrears upon a covenant to pay annuity secured on land is barred after twenty years under this statute. *Sims v. Thomas*, 12 Ad. & El. 536.

As to what payment of rent will take the case out of the statute, see recent cases in *Doe dem. Spencer v. Beckett*, 4 Q. B. 601.

lawed, or judgment obtained against him, and arrested or reversed by writ of error, a new action may be commenced within a year after the reversal of the outlawry, or of the judgment, that is by sect. 6.

Such is the statutable time of limitation in actions on specialties, which, you will have observed, is now in every case twenty years, subject to the above exceptions. Now with regard to simple contracts.

The limitation of time in cases of actions upon simple contracts, whether brought in the form of debt or of *assumpsit*, depends upon stat. 21 Jac. 1, c. 16, which applies both to *assumpsit* and to *debt* in *simple contract*. The words of the act are, "all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants." (a) *Assumpsit*, as *I have explained to you, was originally a species of action on the case. It [*309] therefore falls within the limitation prescribed by this statute, the period limited by which is, as you probably know, *six years*. (b)

All actions upon simple contracts must therefore be commenced within *six years*, unless they fall within certain classes excepted from the [*310] operation of the statute of James I.

In the first place, that statute itself excepts the cases of the person entitled to the action being an infant, married, insane, or beyond seas at the time of the accruing of the right, and gives six years from the removal of the disability. (c)

(a) The statute 21 Jac. 1, c. 16, s. 3, enacts, "that all actions of account, and upon the case, (other than such accounts as concern the trade of merchandize between merchant and merchant, their factor, or servants,) and all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after."

(b) Where a promise is to do a thing on request, the statute runs from the time of the request, and not from the time when the promise was made. *Holmes v. Kerrison*, 2 Taunt. 323.

If any security has been given for the original debt which forms the ground of action, which security has been subsequently set aside or abandoned, a right of action then arises, and the statute runs only from the setting aside of the security, unless it appear that the original consideration had failed. *Huggins v. Coates*, 5 Q. B. 432; *Cowper v. Godmond*, 9 Bing. 748. And where defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default, to have judgment and execution for the whole, as if all the periods for payment had expired, it was held that, in an action of *assumpsit* on the implied promise to pay according to the terms of the defeasance, defendant might show that the first default was made more than six years before action; and that this was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period. *Kemp v. Garland*, 4 Q. B. 519.

(c) But the statute runs notwithstanding any subsequent disability of the creditor, even from insanity or other cause; see *Cassidy v. Steuart*, 2 M. & Gr. 444 n. But by the third section of 12 & 13 W. 3, c. 3, it is provided "that where any plaintiff shall, by reason or occasion of privilege of parliament, be stayed or prevented from prosecuting any suit by him commenced, such plaintiff shall not be barred by any statute of Limitation, or non-suited, dismissed, or his suit discontinued, for want of prosecuting of the suit by him begun; but shall from time to time, upon the rising of the parliament, be at liberty to proceed to judgment and execution." A similar provision is contained in 11 Geo. 2, c. 24, s. 3. The operation of the statute is barred by the saving clause, if a person, then in prison, when the cause of the action arises, during his imprisonment, commences an action after a lapse of six years; *Piggott v. Rush*, 4 Ad. & Ell. 912. The words of the saving clause are, that "if any person entitled to an action, &c., shall be beyond seas, he shall be at liberty to bring it within six years after he shall have 'returned' from beyond seas; but he may reply to a plea of *non assumpsit infra sex annos*, that when he made the

[*311] *In the second place, it also contains the exception which I have just cited with regard to actions upon specialties in the case of the defendant being outlawed, or the judgment reversed or arrested. Indeed, the one is copied from the other.

In the third place, if the *defendant* be beyond seas when the right accrued, (a) the plaintiff has six years after his return, not by the statute of James, but by stat. 4 Anne, c. 16, s. 19, but *it is a singular thing, [*312] that "beyond seas" does not mean the same thing in this act of parliament as in the acts of James and of William IV.; for by 3 & 4 Wm. 4, c. 42, s. 7, it is directed that no part of the United Kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, shall be considered beyond seas, within the meaning of that act, or of the act of James I.; but, as the statute of Anne is not mentioned, it is held that the words "beyond seas" used in that act retain their common-law meaning, which was literally beyond the sea surrounding Great Britain, and therefore the Exchequer has decided in *Lane v. Bennett*, 3 C. M. & Rosc. 72, that Ireland is not within the statute of Anne, and that the plaintiff has still six years in which to bring his action after the return of the defendant, who has been in that part of the United Kingdom ever since the cause of action accrued; and here I may as well observe to you, that in every case of a statute of Limitations, if once the time of limitation begins to run, nothing that happens afterwards will stop it. (*Smith v. Hill*, 1 Wils. 134.) (b)

[*313-*314] *In the fourth place, if the defendant have given an acknowledgment by *writing signed*. (c) "After the passing of the

promises in the declaration he was then beyond the seas, as he has since been and still is, the person may, if he wishes, commence his action, though he is not obliged while any of the disabilities of the statute continue. *Strithorst v. Græme*, 3 Wils. 145. Where a disability has ceased, and the statute begun to run, no subsequent disability will stop it. *Rhodes v. Smethurst*, 4 M. & W. 651; and 6 M. & W. 351. 356.

(a) Plaintiffs may, if they choose, bring their action whilst abroad, or wait till their return when the statute begins to run. *Le Veux v. Berkeley*, 5 Q. B. 836; and see 2 Wm. Saunders, 120 a, notes h and k. *Pigott v. Rush*, 4 Ad. & Ell. 912; and *Strithorst v. Græme*, 3 Wils. 145; and where one of two co-contractors is beyond seas who is a defendant, the statute does not run; *Fannin v. Anderson*, 14 Law Journ. Q. B. 282; for that case decided, that although the statute commences to run when the right of action accrues, where there are several joint *claimants*, and one of them is within seas, where there are joint *debtors*, and one of them is abroad when the cause of action arises, the statute does not begin to run until his return. Thus a very important distinction arises between the position of co-plaintiffs and co-defendants. This distinction arose upon the wording of the 19th sect. of statute of Ann. c. 16, together with the 21 Jac. 1, c. 16; and the reason of it seems to be, that one plaintiff can act for others and use their names in an action, and therefore the protection of the statute is not wanted. With respect to defendants, however, the reason does not apply; the plaintiff cannot bring the defendant into court by any act of his, and therefore if he be compelled to sue those who are within seas without joining those who are abroad, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent. On the other hand, if he sue out a writ against all, and neither continues it without declaring, or proceeding to outlawry against the absent parties, declares against those within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and is obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne.

(b) See ante, page 310, note (c).

(c) The statute 9 Geo. 4, c. 1, enacts "that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any

Statute of James, and until Lord Tenterden's Act, which I shall *immediately mention, an acknowledgment by mere words would have been [*315]

contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect by reason only of any written acknowledgment or promise made and signed by *any other or others of them*; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatever: provided also that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

No part of the statute has given rise to more litigation than this saving clause. *It is now settled that the acknowledgment in order to bar the statute must contain an unconditional promise to pay; but the law implies such promise from an acknowledgment of the debt.*

Many of the older cases hold a different doctrine; such as *Yea v. Fouraker*, 2 Burr. 1099; *Leaper v. Tatton*, 16 East, 420; and *Dorthwaite v. Tibbut*, 5 M. & S. 75, per Lord Ellenborough; *Scales v. Jacob*, 3 Bing. 638; *Clark v. Hougham*, 2 B. & Cr. 149; *Thornton v. Illingworth*, 2 B. & Cr. 824; in which latter case Bayley, J. said, "The ground on which the statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one." And Holroyd, J. added, "Where the statute of limitations has run, a new promise revives the debt *ab initio*, and that is equally the case whether the promise is made before or after the commencement of the action." Littledale, J. gave judgment to the same effect. This, however is expressly overruled by the leading case of *Tanner v. Smart*, 6 B. & Cr. 603, where, in an elaborate judgment, Lord Tenterden, C. J. says, "The only principle upon which it (an acknowledgment) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration the plaintiff succeeds: when it does not support them, *though it may show clearly that the debt has never been paid, but is still a subsisting debt*, the plaintiff fails." This decision was based chiefly on that of *Heylin v. Hasting*, Salk. 29, one of the oldest cases on the statute, and has been recognized and cited in almost every subsequent case on the point. See *Morrell v. Frith*, 3 M. & W. 402; *Bateman v. Pindar*, 3 Q. B. 574; *Hurst v. Parker*, 1 B. & Ald. 92; *Cripps v. Davis*, 12 M. & W. 159; *Gardner v. McMahon*, 3 Q. B. 561; *Hart v. Prendergast*, 15 Law Journ. Ex. 223.

The argument by which this decision by Lord Tenterden is supported, is this: "If an acknowledgment had the effect which the cases in the plaintiff's favour attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute: whereas the constant replication ever since the statute to let in evidence of an acknowledgment, is that the cause of action accrued (or the defendant made the promise in the declaration) within six years." The inference suggested by this mode of pleading, it is humbly submitted, scarcely supports the doctrine that the acknowledgment is a new promise, and that the action is brought upon this new cause: for if it were so, a new assignment would be required, where the plaintiff declares (as he always does) on the old debt. (See *Leaper v. Tatton*, *supra.*) To this the defendant pleads the statute of Limitations; and if the plaintiff can only rely on the acknowledgment as a "new cause of action," he ought then, according to the rules of pleading, to assign such new cause and fresh promise; and thereby distinguish it from the old ground of action, to which the defendant has pointed in his plea. The only reason why the new assignment is *not* required seems to be, that the acknowledgment is *not* a new cause of action, and there is one very cogent reason why it could not be so treated, namely, that if the issue turned upon the new promise, it would require a new consideration to support it; there being *no* new consideration, it is treated merely as a bar to the plea of the statute, and evidence of it is admitted under a traverse of that plea, without any necessity to reply to it specially. It may appear somewhat presumptuous to subscribe to the opinion even of Lord Ellenborough and Mr. Justice Bayley in preference to that clothed with the authority of modern judgments; but it is scarcely possible to avoid observation on the difficulty of reconciling the admitted principle, that the statute of

[*316-317] sufficient ; but, by that *which is the 9 G. 4, c. 14, the acknowledgment must be in *writing* "signed by the party *charge-

Limitations was only intended to bar the remedy, and not to discharge or extinguish the original debt, (*Higgins v. Scott*, 2 B. & Ad. 413,) with the modern doctrine: namely—that the exemption from the statute, which alone bars the remedy for the original debt, does not revive it, but creates a new one, springing from a new promise: for this is itself defective, as regards consideration, in the first element of a valid contract. But this is not all, for it appears that the words themselves of Lord Tenterden's Act favour the doctrine of Mr. Justice Bayley, and seem to repel the construction that a promise, express or implied, is essential to bar the statute (as declared by his lordship in *Tanner v. Smart*, and by the Court of Exchequer in the recent case of *Hart v. Prendergast*, 15 L. J. Ex. 223.) The words are, that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of;" &c. It is submitted that the contemplation of a continuing contract, as well as the disjunctive conjunction distinguishing promises from acknowledgments, are irreconcilable with the notion that there must be a new promise, and that an acknowledgment is valid only because it implies one. Still more does it seem irreconcilable with the practical conclusion built upon this modern doctrine, and to which attention must now be drawn.

As long as the doctrine prevailed that it sufficed to show an acknowledgment which rebutted the presumption arising from the lapse of time that the claim was satisfied, it was not only immaterial whether a promise were made or not, but a condition with which, such promise, if made, might chance to be coupled, would nowise have defeated the effect and virtue of the acknowledgment: for the acknowledgment was held to be in itself a bar to the statute, and no promise, either express or implied, was required. In *Dorthwaite v. Tibbut*, the debtor said he "*would not*," and in *Leaper v. Tatton*, he "*could not*" pay; and yet in both they were held to have sufficiently admitted the debt. But according to the doctrine now adopted from *Tanner* and *Smart*, any additional promise defeats the acknowledgment: so that however strongly the debt may be admitted, unless there be a promise to pay it, it cannot be enforced. Lord Tenterden said in *Tanner v. Smart*, "Upon a general acknowledgment, *where nothing is said to prevent it*, a promise to pay, may, and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *Expressum facit cessare tacitum* prevail?" So rigorously has this been followed, that in the last reported case, *Hart v. Prendergast*, (supra) the following written statement was held sufficient "acknowledgment or promise" to satisfy the statute! "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him at all events, a portion of the debt, when we shall settle about the liquidation of the balance." Pollock, C. B. held, "It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall pay at some future time; it should contain either an unqualified promise to pay, that is, a promise to pay *on request*, or if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition, on the arrival of that period, should be proved by the plaintiff. The only question in the present case is whether this letter contains a promise to pay the debt on request. Now, certainly it does not in terms contain such a promise." See also *Spong v. Wright*, 9 M. & W. 629; *Morrell v. Frith*, supra, and *Cripps v. Davis*, 10 M. & W. 159.

This doctrine as to the conditional ability has been carried further on the authority of *Tanner v. Smart* in the case of *Waters v. Earl of Thanet*, 2 Q. B. 757, where the defendant gave an acknowledgment of certain overdue bills of exchange in a memorandum thus worded:—"I hereby debar myself of all future plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the said bills and of the interest accruing thereon at the time of my being so sued: and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each or both of them, whenever my circumstances may enable me to do so, and I may be called upon for that purpose." Now in this case the defendant had become able to pay the bills above six years before the action was brought; but the plaintiff was ignorant of it. But it was decided that when a debtor, protected by the statute, promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action must prove the ability which revives his right. The period at which it is revived is that of the fact taking place, *not* of his becoming acquainted with it.

These decisions are not only unsupported by the case of *Heylin v. Hasting*, from which that of *Tanner v. Smart* derived its authority, but are at variance with it: the words there used by the debtor were, "Prove it, and I will pay you;" and it was held, that "the promise, *though conditional*, shall bring it back within the statute, *for the defendant waives the benefit of the act as much as by an express promise*; and *Holt, C. J.*, having reserved

able," and the Court of Common Pleas has decided in *Hyde v. Johnson*, 2 Bing. N. C. 777, *that, there being no mention of an agent, a signature by an agent is not sufficient for the *purpose, so that [*318-*319] it is curious enough to observe that under this Act a man's agents cannot bind him by the acknowledgment of a simple contract debt, though he may, under Lord Brougham's Act, by acknowledging a bond debt, which is a contract of so much more importance in the eye of the law. See, on the construction of Lord Tenterden's Act, *Waters v. Tomkins*, 2 C. M. & R. 726. *Waller v. Lacy*, 1 M. & Gr. 54.

The fifth *exception* arises from a clause in Lord Tenterden's Act, which exempts from the operation of that Act the effect of any payment, whether of principal or interest. Now, before Lord Tenterden's act passed, a part payment, *whether of principal or interest, had the effect of taking the debt in respect of which it was paid out of the operation of the [*320] statute (see *Whitcombe v. Whiting*, Dougl. 652,) and therefore will have the same effect, since *Wyatt v. Hodson*, 8 Bing. 309, *Channell v. Ditchburn*, 5 M. & W. 494, from the former of which cases you will see that where there are several joint debtors, payment by one takes the debt out of the operation of the statute *as against the others.*(a)

the point, ten judges conferred and approved of the judgment; adding, that if the creditor proved the delivery of the goods, which he might do *at the trial*, it would suffice to take the case out of the statute. (See *Salk.* 29, and 1 Lord Raym. 389 & 421, S. C.) It has been also held, that an acknowledgment may *prima facie* satisfy the statute, but other evidence is admissible to rebut such inference; such, for example, as shows that a document was drawn up with a view to a debt being paid in a particular way. (*Cripps v. Davies*, 12 M. & W. 159.)

If the evidence be of a promise to pay on condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. For instance, where the acknowledgment was, "I am in receipt of your letter of the 6th, handed me this morning. I have forwarded it to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what she may be short I will assist to make up. I send you her address." This was held sufficient. (*Humphreys v. Jones*, 14 M. & W. 3, per Parke, B.)

Neither is it necessary that the sum due should be named; but if there is an unequivocal admission of the debt, and a difference only upon the amount, the operation of the statute is barred. (*Waller v. Lacy*, 1 M. & Gr. 54; *Gardner v. M'Mahan*, 3 Q. B. 561.)

The promise or acknowledgment must, in all cases, be made before action brought; it is unavailable if made afterwards. (*Bateman v. Pinder*, 3 Q. B. 574.)

(a) Stat. 9 Geo. 4, c. 14, s. 1, as we have seen, enacts that "no acknowledgment or promise shall deprive any party of the benefit of the statute, unless such acknowledgment or promise shall be in writing;" with this proviso, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest." There have accordingly, been many decisions as to what is a sufficient payment to bar the statute, of which some notice is expedient. It is not required that the whole sum due should be paid. In *Bateman v. Pinder*, 3 Q. B. 574, *Wightman, J.*, said, "Part payment is an acknowledgment, and an acknowledgment, though not a promise in terms, may amount to one virtually;" but, where it is not made till after action brought, it cannot prevent the operation of the statute." Part payment of interest equally suffices. (See *Dowling v. Ford*, 11 M. & W. 329.) Nor is it essential that the money should pass; for the actual statement of a mutual settlement of account between the parties is equivalent to a payment, if the party to whom the sum is owing agree that it shall be paid by the setting off of the same amount, so that the sum set off is evidence of payment, if the party against whom it is set off did not object to it when his account was settled. (*Scholey v. Walton*, 12 M. & W. 510.) The principle of this is, that the going through an account with items on both sides, and striking a balance converts a set-off into a payment, and is a transaction out of which a new consideration may be said to arise. See also *Ashley v. James*, 11 M. & W. 542.

[*321-*322] *The last exception to which I have to advert is that arising out of the exception in the statute *of James the First, of accounts between merchant and merchant. It was for a long time thought that the effect of this clause was to take dealings between merchants out of the Statutes of Limitation altogether, where there was an account-current between them, and enable a merchant to maintain an action at any time [*323] against another merchant in respect of debt contracted in the course of trade, and forming an item of such an *account; and you will find this view learnedly supported in the notes to Wm. Saund., Webber v. Twill, vol. ii. 121. But the Court of Exchequer has very lately decided that the exception in favour of merchants' accounts can only be taken advantage of in an action of account properly so called, not in an action upon promises. That decision is Inglis v. Haigh, 8 M. & W. 769, and the effect of it has been to render the old and almost obsolete action of account of considerable importance. Several actions of account have lately been commenced in consequence of the decision in Inglis v. Haigh, for the purpose of taking advantage of the exception of the statute in favour of [*324] merchants,^(a) and in all probability we in the course of a few months will hear a good deal of this ancient and almost forgotten form of action.

Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the Statute of Limitations. (Burn v. Boulton, 15 Law Journ. C. P. 97.) The character of such payments is rather matter of evidence than of law. The question will always turn upon the distinction between cross demands and set-off on the one hand, and part payment on the other; a distinction clear enough in principle, but dependent for its application on facts, and therefore not always applicable with ease. (Worthington v. Grimsditch, 15 Law Journ. Q. B. 52; Vaughn v. Cope, 6 M. & W. 824.)

Payment of interest by one of the makers of a joint and several note is sufficient to take the case out of the Statute of Limitations as to the other maker, notwithstanding he joined in the note merely as a surety; and notwithstanding such payment be made more than six years after the note became due. So a payment made by one partner, after the dissolution of the partnership, on account of a partnership debt, and after six years have elapsed without any acknowledgment of the debt, has been recently held sufficient to take the case out of the statute as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt. (Goddard v. Ingram, 3 Q. B. 839.)

As regards the evidence of payment, it appears that no *admission* of payment suffices unless it be in writing, and signed by the party chargeable. (Willis v. Newham, 3 Y. & J. 518; Bailey v. Ashton, 12 A. & E. 493; Jones v. Rider, 4 M. & W. 32;) therefore the signature of a clerk to the party charged is not sufficient; it must be signed by the debtor himself. (Hyde v. Johnson, 2 B. N. C. 776.) Whether the signature of one of several partners in a firm has the effect seems still a question. (Clark v. Alexander, 8 Scott, 163, per Tindal, C. J.) Although the fact that payment by one of them suffices seems to imply that the admission of it by one would equally suffice. Lord Abinger, C. B., and Mr. Baron Parke, have expressed an opinion that these decisions have gone too far: (see Maghee v. O'Neil, 7 M. & W. 531;) they are nevertheless not overruled. But although verbal admissions of payment are thus unavailing to bar the statute, where some proof of a payment is given, nothing in the statute prevents the adducing of oral evidence to corroborate such other proof, though it is not sufficient in itself to prove the payment. (Waters v. Tompkins, 2 Cro. M. & R. 723; Bevan v. Gething, 3 Q. B. 740; see also Bailey v. Ashton, 12 A. & E. 493; Edan v. Dudfield, 1 Q. B. 307, per Lord Denman, C. J.)

It is only necessary to remark, in addition, that the courts will allow a writ which has been issued in time, and which designates the plaintiffs wrongly, to be amended, where a new action would be barred by the statute. (See Brown v. Fullerton, 13 M. & W. 556; and Lakin v. Watson, 2 Cr. & Mee. 685.) But they will not do so where the object is to make another person a co-defendant, his nonjoinder having been pleaded in abatement. (Roberts v. Bate, 6 A. & E. 778.)

(a) The conclusion thus justly drawn from the decision in the case of Inglis v. Haigh,

I have now gone through the various topics which I proposed to discuss with reference to contracts.(a)

has been subsequently narrowed by that of *Cottam v. Partridge*, 4 M. & Gr. 271, which decided that "an open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an account as concerns the trade of merchandize between merchant and merchant, within the exception of the Statute of Limitations." (24 J. 1, c. 16, s. 3.) In *Inglis v. Haigh*, 8 M. & W. 769, the Court of Exchequer seems to have decided that the exception in the Statute of Limitations as to merchants' accounts, applies only to cases where an action of account, or an action on the case for not accounting, will lie, but not to an action of *indebitatus assumpsit*. Without going so far as that decision, (says Tindal, C. J.), (though I do not mean to impugn it,) I think that the exception is not applicable where an action of account cannot be maintained; and I am of opinion that, under the circumstances of the present case, an action of account would not lie. [His lordship read the 3d section of the statute, 21 Jac. 1, c. 16.] The exception, therefore, extends only to such accounts as concern the trade of merchandize between merchant and merchant, their actors or servants, and cannot apply, except where an action of account, or an action on the case for not accounting, would lie. Is this a case in which an action of account could be maintained? It is laid down in Selwyn's *Nisi Prius*, p. 1, 8th edit., that by common law, an action of account for the rents and profits may be maintained by the heir, after he has attained the age of fourteen years, against the guardian in socage; so at the common law, account will lie against a bailiff or receiver, and, in favour of trade and commerce, by one merchant against another. It has not been contended, that an action of account will lie in every case where there have been sales of goods between tradesmen, but only where there are mutual accounts, and an agreement has been come to that the one shall be set off against the other, and the balance alone is claimed by the party in whose favour it is found; for otherwise the case could not be distinguished from the ordinary one of goods sold and delivered, with a claim of set-off of a similar description."

(a) As many cases have recently occurred which tend to assist the subject, and which do not properly fall under the foregoing heads, they are annexed in the Appendix under the title of "Subjects of Contracts."

The first part of the book is devoted to a general history of the United States from its discovery by Columbus in 1492 to the present time. It covers the early years of settlement, the struggle for independence, the formation of the Constitution, and the growth of the nation. The second part of the book is devoted to a detailed history of the United States from 1789 to the present time. It covers the early years of the Republic, the struggle for independence, the formation of the Constitution, and the growth of the nation. The third part of the book is devoted to a detailed history of the United States from 1789 to the present time. It covers the early years of the Republic, the struggle for independence, the formation of the Constitution, and the growth of the nation.

APPENDIX.

*SUBJECTS OF CONTRACT. [325]

DEFINITION OF THE SUBJECTS OF CONTRACT.—CONSTRUCTION OF CONTRACTS
SALES.—STOPPAGE IN TRANSITU.—WARRANTIES.—DEBTS.—BAILMENTS.

POTHIER says that "Contracts have for their object either something which one of the contracting parties stipulates for being given to him, and which the other party promises to give, or something which one of the party stipulates to be done or not done, and the other promises to do or not to do." Contracts, he says, produce obligations. Now obligations are, as far at least as their object is concerned, identical with the contract from which they spring, for that which the parties to it are obliged by contract to do or not to do is the subject of the contract itself. A definition, therefore, of the object of obligations is a definition of the subject of contracts. In describing these, Pothier says, "The object of an obligation may be either a thing (*res*) in the proper and confined signification of the word, which the debtor obliges himself to give, or an act (*factum*) which the debtor obliges himself to do or not to do." Not only things themselves (*res*) may be the object of an obligation; the mere use or possession of a thing *may [326] be so likewise. For instance, when a person hires anything, it is the use of the thing, rather than the thing itself, which is the object of the obligation."

"All things which are in commerce may be the object of obligations; but it is necessary that it should be possible, for *impossibilium nulla obligatio est*, l. 85, ff. de Reg. Jud." "But it is sufficient that the fact to which a person obliges himself in my favour be possible in itself, though it may not be so in respect to him, because, unless I am aware of that impossibility, I have a right to rely upon the performance of it, and he is effectually obliged to me *in id quanti mea interest non decipi*. He must blame himself for not having measured the extent of his capacity, and for having rashly engaged to do an act to which he was not equal."

"For an act to be the object of an obligation, it must be something determinate, therefore the 2d law, ff. § 5, *de eo quod certo loco*, decides, that if a person promises another to build a house, without saying where, he does not contract any obligation."(a)

(a) Evans says, in a note, that the obligation may acquire certainty from the relative

Thus Pothier's definition of contracts, combined with that of obligations, defines the subject-matter of contracts, and applies alike to those [*327] which are of the nature *of promises implied by law from the state of facts, and to express agreements between the parties. (a)

I. ON THE CONSTRUCTION OF CONTRACTS.

In order to ascertain the subject of a contract, it is often necessary that it be first correctly construed, in order to discover the intent of the parties. Where it consists merely of a sale or other simple transaction, this necessity does not arise; but where it relates to some special agreement, the rules of construction become of importance. In ethics, according to Paley, a promise is to be construed in the sense in which the promiser believed that the promisee accepted it. This rule does not hold in law; for it is obvious [*328] that the belief of the *promiser as to the acceptance of the promisee is not susceptible of that facility of proof which is required in the trial of a suit; a much more practical rule is therefore adopted, and we find it thus tersely expressed in *Mallam v. May*, 13 M. & W. 517, by the Court of Exchequer:—"Words are to be construed according to their strict and primary acceptance, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense, they are incapable of being carried into effect, and subject always to the observation, that the meaning of a particular word may be shown, by parol evidence, to be different, in some particular place, trade or business, from its proper and ordinary acceptance."

According to this plain rule, mercantile contracts are to be construed according to the usages of the trade, or the peculiarities of the branch of commerce to which they relate. (See cases cited *antè*, p. 30.) It is matter for the jury in these cases to decide the sense in which such terms are used; *Parker v. Grange*, 2 Cr. M. & Ros. 617; but not to construe a deed. "Usage," says Pothier, "is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses, although they are not expressed." The context will generally assist in

situation of the contracting parties; but that that point is referable to the principle of construction.

Pothier enumerates immoral and illegal obligations among the impossible; our law more properly regards them as void contracts, under which head Mr. Smith has fully treated of them in the sixth and seventh Lectures.

Pothier also names as a condition of the object of a legal obligation, that "the party in whose favour the obligation is contracted, ought to have an *appreciable interest* in the act being done." This interest is a consideration, and falls upon that head.

(a) Pothier dissects from the term Contract all those obligations which the law imposes "in favour of another without any agreement between them;" among which are what he calls *quasi Contracts*; such as when a person pays what he does not owe to another person, the law compels him to repay it, and this he terms an obligation, and not a contract; so also in cases where the obligation arises from "*quasi delicta*," or acts of negligence, whereby one person causes damage to another. These are, no doubt, in some degree distinguishable from ordinary contracts, and the latter class of cases, in many instances, belong to trespasses and torts; but nevertheless the former class, as well as many injuries which are remediable by actions of debt and assumpsit, arise, according to English law, *ex contractu*, and fall within the class of implied promises. Thus the law always implies a promise to repay money if it shall prove to have been paid by mistake, and to take due and proper care of goods hired or lent, the breach of which, as we have already seen, is the subject of an action for breach of that promise. See *ante*, p. 94, note.

finding the intention. The application of these plain rules will solve nearly every case which can occur; but where the terms of the contract are nevertheless helplessly ambiguous, the rule given by Pothier, derived from the civil law, is, that it must, as a last resource, be construed "against the person who stipulates any thing, and in discharge of the person who contracts the obligation."

The case in which the rules of construction are chiefly required is where the contract is conditional, or, in other words, where its performance on the part of one or both parties is contingent on something being done, or happening, *before it takes effect, and which is termed a *condition precedent*. Such conditions must be accomplished in the manner the [*329] parties most probably intended. The question whether a condition is precedent or concurrent is likewise a question of the intention of the parties themselves as it appears on the contract, and not, as has been sometimes supposed, whether the agreement will bear a cross action. See *Fishmongers' Company v. Robertson*, 5 M. & Gr. 199, per Tindal, C. J., and *Kemble v. Mills*, 1 M. & Gr. 767, per Tindal, C. J. The same rule applies to questions as to whether contracts are dependent or independent of each other, and also as to mutual covenants, and which are to be interpreted according to whether it were or not the intent of the parties that they should apply to the whole consideration on both sides, in which case the condition is a condition precedent to that of the other, but otherwise not so. See *Slavers v. Scott*, 3 Bing. N. C. 308.

Examples of what are and are not conditions precedent, and of the construction put on them, will be found in *Glaholm v. Hays*, 2 M. & Gr. 257, *Mackintosh v. The Midland Counties Railway Company*, 14 M. & W. 548, *Ireland v. Harris*, 14 M. & W. 432, *Parker v. Rawlings*, 4 Bing. 280, *Dawson v. Dyer*, 5 B. & Ad. 584.

Now, wherever there is a condition precedent, it must be performed before the party who is to perform it can have an action upon it; if not literally performed, at least substantially, unless he was prevented from doing so by some default of the opposite party which exonerates him. See 2 Wm. Saunders, 352.

Where an action is brought on a breach of contract dependent on a condition precedent to be performed by the plaintiff, he must allege that it is performed in the declaration. See 1 Wm. Saunders, 320, c., and 2 Wm. Saunders, 107, b.

*II. OF SALES.(a)

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Sales form by far the largest portion of the transactions of commerce and the subjects of contract. They include all agreements by which property is parted with for a valuable consideration, whether there be a money payment or not, provided that the bargain be made, and the value measured in money terms; for instance, it includes all cases where there is a transfer of credit, by which means the great bulk of commercial dealing is effected. Money itself very rarely passes, except in the small retail purchases of life.

(a) As to sales of goods above the value of 10*l.*, which require to be in writing under the 17th section of the Statute of Frauds, see ante, Lecture iv.

Even where cheques are drawn and paid, it frequently happens that no money passes. In the Clearing House in the city, where the London bankers exchange cheques drawn on them against each other, payments amounting to many millions sterling are thus made every week by means of a simple transfer of credit from one banking house to another. Contracts of sale, therefore, are by no means limited to sales for money; but, on the other hand, neither do they extend to bargains of barter: where one article or set of goods is intended to be exchanged for another, no price (*pretium*) being attached, it is not a sale, for the transaction is in the first instance made as an exchange of goods without reference to money payment.

The first requisite of a contract of sale is the ability of the vendor to sell. This he derives either from his absolute property in the goods, or from circumstances which give him a legal right to dispose of them. This he has not only when authorised to do so for another, as in the case of factors, but [*331] in certain cases without any *such authority, provided the sale be made in market overt, of which see *Com Dig. Market (E.)*; 2 Inst. 713, *Lyons v. De Pass*, 11 A. & E. 326, and *Wilkinson v. King*, 2 Camp. 336. See also statutes 2 P. and Mary, c. 7, and 31 Eliz. c. 12. But the vendee would not be bound by a contract which the vendor had not the power to carry into effect.

Where the vendor is empowered to sell, there may be a complete and valid sale without delivery to and acceptance by the purchaser, provided that the property has vested in him, which enables the vendor to maintain an action for goods bargained and sold (see *Atkinson v. Bell*, 8 B. & Cr. 277,) and the test is the appropriation of the thing sold to the buyer with his assent; the bargain being completed; (see *Dixon v. Yates*, 5 B. & Ad. 340, per Parke J.;) but if anything remains to be done before delivery, as, for instance, to ascertain the weight or settle the price of the goods, the action will not lie. *Rhoades v. Thwaites*, 6 B. & Cr. 392. It is, however, quite immaterial whether the right of possession be out of the vendor, so long as the right of property is in the vendee. *Sparks v. Marshall*, 2 Bing. N. C. 761.

To maintain an action for goods sold and delivered, it is requisite that there should be not only complete delivery to, but actual or implied acceptance by the buyer. The cases in which acceptance is required by the 17th section of the Statute of Frauds, and a definition of what it consists in, have been already explained, (see ante, p. 71,) and there is no sound distinction between the sort of acceptance required by that section and that required to maintain this action. See a learned note by Mr. Smith on this point in his "Mercantile Law," p. 447, ed. 1843.

Goods, as we have seen, are delivered by any act which places them in the vendee's power or possession, without respect to where they may be placed. *See *Salter v. Woollams*, 2 M. & Gr. 650. *Wood v. Manley*, 11 A. & E. 34. [*332]

As regards the time of delivery where goods are sold, and nothing is said about the time of delivery or of payment, the seller is bound to deliver them, provided the buyer is ready to pay the price, and a demand is sufficient *prima facie* evidence of such readiness; see 2 Wm. Saund. 352, a, in notis; and the delivery must take place within a reasonable period, and what is such is for the jury to decide. *Ellis v. Thompson*, 3 M. & W. 453.

The law has recently been fully laid down on this subject in the case of

Startup v. Macdonald in error 6 M. & G. 593, where an action of assumpsit was brought for not accepting ten tons of linseed oil delivered at nine o'clock at night on the last of fourteen days specified as the period within which it should be delivered. Parke, B. thus stated the law : "A party who is, by contract, to pay money or to do a thing transitory to another anywhere on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract ; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of the contract. In such a case the party bound must find the other at his peril (*Kidwelly v. Brand*, Plowd. 71,) and within the time limited, if the other be within the four seas ; *Shepp.* 136 ; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that at a convenient time before midnight, such time varying according to the quantum of the payment, or the nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count ; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination *and receipt. This done, [*333] he has, so far as he could, paid or delivered within the time ; and it is by the fault of the other only that the payment or delivery is not complete."

"But where the thing to be done is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party *at that place* ; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain, and therefore it fixes a particular part of the day for his presence ; and it is enough if he be at the place at such a convenient time before sunset on the last day so that the act may be completed by daylight ; and if the party bound tender to the party there, if present, or, if absent, he be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient ; and if the tender be made *to the other party* at the place at any time of the day, the contract is performed ; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary ; and if it happens that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good. (See *Bacon's Abr. tit. Tender (D.,) Co. Lit. 202, a.*) This is the distinction which prevails in all the cases,—where a thing is to be done *any where*, a tender a convenient time before midnight is sufficient ; where the thing is to be done *at a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, *and a convenient time before sunset. I therefore think that the tender was [*334] good in this case in point of time, and, consequently, that the plaintiffs having been able to meet with the defendant, actually to tender the oil to him a sufficient time before midnight to enable the defendant to receive, examine,

and weigh the oil, performed, as far they could, their part of the contract, and were entitled to recover for the breach of it by the defendant."

The property is equally passed by the delivery of the goods to a third person as agent to the vendor, who becomes an agent by a notice given and agreed to by him for the object. The judgment of the Exchequer was thus delivered by Parke, B., in the case of *Bryans v. Nix*, 4 M. & W. 791:—"If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether that depositary is a common carrier, or shipmaster employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected."

Where no question arises as to payment, the sale vests the property in the vendee, and gives him perfect power of possession, and a right to enforce delivery, which the vendor cannot withhold; for mere demand implies, as we have stated, a readiness to pay, and a formal tender is not necessary, unless there be some condition that the goods shall not be sold on credit. *Bloxam v. Saunders*, 4 B. & C. 941.

Where the payment is not made before delivery, a question often arises of a far more intricate nature, how far the vendor may rescind the contract, and what are the precise rights which he possesses. One of the last cases [*335] on this point, that of *Martindale v. Smith*, 1 Q. B., *389, decides that where goods are sold on credit, and a time is fixed when the credit shall expire, unless it be expressly stipulated to the contrary, failure of payment at that time does not transfer the property in the goods to the vendor, but merely gives the vendor a right of action for the price, and if they are still in his possession, *a lien upon them*, which may be destroyed by tender of payment on the part of the buyer; but default of payment does not rescind the contract, or re-vest the property in the vendor, until a reasonable time has elapsed; but though the case of *Martindale v. Smith* expresses no limitation as to the length of time that the property is thus, as it were, held in abeyance, the law is clearly pronounced in former cases on that point. Thus in *Langford v. Tyler*, Salk. 113, the rule was said to be this:—"After earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore, if the vendee do not come and pay for, and take away the goods, the vendor ought to go and request him, and then, if he do not come and pay for, and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person." This rule, which, as Mr. Smith elsewhere remarks, is certainly the most convenient, seems to have been sanctioned by Lord Ellenborough, C. J., in *Hinde v. Whitehouse*, 7 East, 558, for his lordship considered that, after earnest, and before the payment of the whole price, the property is in the vendee, subject only to the vendor's *lien*, but that the vendor may, upon finding the vendee delay to accomplish his bargain, go to him, and request him to do so, and if he, after that, delay for an unreasonable time, may treat such further delay as equivalent to a consent to rescind the sale, and the property will thereupon become re-vested in himself. And so it has been thought *e converso* might the vendor's unreasonable delay to deliver

the goods *when he had stipulated so to do, perhaps entitle the vendee to rescind. See *Barber v. Taylor*, 5 M. & W. 527. [*336]

Thus the vendor has a lien for the price where he has no right to rescind the contract on account of default by the vendee. Lien is right of temporary possession against the person who has the right of property, until the claim of the holder respecting it is satisfied by the owner. This lien, however, in the cases mentioned, is confined to the right to retain goods whilst they remain in the hands of the seller, but there is one very important exception to this rule, it is this: when the unpaid vendor has reason to suspect the insolvency or bankruptcy of the vendee, he may stop or retake the goods after they have left his hands, and whilst they are in the course of transit to the buyer. Mr. Smith, in his *Mercantile Law* (p. 461,) thus explains the comparative rights of the vendor to retain goods as a lien for the price in ordinary cases, and to stop in transitu in cases of insolvency. "Where the vendor has done that which amounts to a delivery of the goods, *ex gr.* has made a *symbolical* transfer of property, which is, by its nature, (a) unfit to be delivered otherwise; as, for instance, by giving up to the vendee the key of the warehouse where it is deposited, (b) or giving a delivery order to the wharfinger in whose possession it is, to which order the wharfinger has signified* his assent; (c) or where he has done any act which would determine his right to stop *in transitu*. But it must be observed, [*337] that the converse of this last proposition is not true, for many acts will be sufficient to divest the vendor's lien for his price, which will not be sufficient to hinder him from stopping the goods *in transitu*, if the vendee should become insolvent. For instance, delivery of goods to an agent of the vendee appointed to convey them to him, deprives the vendor of his lien for the price, but not of his right to stop the goods *in transitu*, in case of the vendee's failure before they have reached him. (d) A delivery of part of the goods, where there is no intention of separating that part from the whole, divests both the lien and the right to stop *in transitu*; (e) but it is otherwise where there is such an intention, (g) though it has been said that *prima facie*, a delivery of part imports an intention to deliver the whole. (h) The vendor's lien cannot be determined by a second sale of the same goods, for the ordinary rule of law, is, that the second vendee of a chattel cannot stand in a better situation than his own immediate vendor. (i) Where the goods are in the vendor's own warehouse, he does not lose his lien by *giving [*338] a delivery order; (k) nay, even a charge made by the vendor against

(a) *Manton v. More*, 7 T. R. 67; *Hibbert v. Carter*, 1 T. R. 745; *Lempriere v. Pasley*, 2 T. R. 485; *Zevinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrien*, 7 Taunt. 278.

(b) *Ellis v. Hunt*, 3 T. R. 464; *Copeland v. Stein*, 8 T. R. 199; *Spears v. Travers*, 4 Camp. 251; *Greave v. Hepke*, 2 B. & A. 131.

(c) *Lucas v. Dorrien*, 7 Taunt. 278; *Hawes v. Watson*, 2 B. & C. 540; *Harman v. Anderson*, 2 Camp. 243; *Stoveld v. Hughes*, 14 East, 408; *Stonard v. Dunkin*, 2 Camp. 344; *Cumming v. Brown*, 9 East, 506; *Swanwick v. Sothorn*, 9 A. & E. 900.

(d) See a learned note by Mr. Starkie, *Law of Evidence*, 2d ed. p. 892.

(e) *Slubey v. Heyward*, 2 H. Bl. 504.

(g) *Bunney v. Poyntz*, 4 B. & Ad. 570; *Simmons v. Swift*, 4 B. & C. 857; *Dixon v. Yates*, 5 B. & A. 339; *Miles v. Gorton*, 4 Tyrwh. 295.

(h) *Per Taunton, J.*, in the case of *Betts and another v. Gibbins*, 4 N. & M. 77; 2 Ad. & El. 73. See *quære*.

(i) *Dixon v. Yates*, 5 B. & Ad. 339; *Small v. Moates*, 9 Bing. 592.

(k) *Townley v. Crump*, 4 E. & A. 58.

the vendee for warehouse rent does not destroy his lien; at all events not where the charge is pursuant to the terms of the original contract of sale, for then the rent is only, as it were, an additional price.^(a) But it would, perhaps, be otherwise if the charge for warehouse rent were founded on a subsequent distinct contract, for that might have the effect of making the seller's warehouse, that of the buyer.^(b)

The vendor may of course avoid the sale, by showing fraud in the vendee, ex. gr.; that he deterred others from bidding by his representations."^(c)

Bayley, J., in *Bloxam v. Sanders*, 4 B. & Cr. 948, after speaking of the vendor's right to stop *in transitu*, says, "And if this be the case after he has despatched the goods, and while they are *in transitu*; *à fortiori*, is it, where he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of *possession*, if they will pay or tender the price; or they may still act upon their right of *property* if any thing is done unwarrantable to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of *property* and right of *possession* are both requisite, unless they have both those rights."

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*III. STOPPAGE IN TRANSITU.

The vendor's right to stop *in transitu* depends on two main points; first, the bankruptcy or insolvency of the vendee;^(d) and, secondly, that the goods are still in the course of transit, and are neither actually nor constructively in the possession of the vendee, for when that happens the transit is ended, and with it ceases the right to stop *in transitu*. This right is thus defined by Bayley, J., in *Bloxam v. Sanders*. "The vendor's right, in respect of the price, is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*; and his insolvency, without payment of the price, defeats that right."

The stoppage may generally be made at any time during the transit. In *Stokes v. La Riviere*, cited in *Bottingk v. Inglis*, 3 East, 381, Lord Mansfield, C. J. said, "No point is more clear than that if goods are sold and the price not paid, the seller may stop them *in transitu*. I mean in every sort of passage to the hands of the buyers. There have been a hundred

(a) *Miles v. Gorton*, 4 Tyrwh. 295.

(b) *Hurry v. Mangles*, 1 Camp. 452; *Winks v. Hassall*, 9 B. & C. 375.

(c) *Fuller v. Abraham*, 3 B. & B. 116; *Noble v. Adams*, 7 Taunt. 59; *Earl of Bristol v. Welmore*, 1 B. & C. 514; *Gladstone v. Hadwen*, 1 M. & S. 517.

(d) At least the ordinary right of countermanding the actual delivery of goods sent to a consignee, is limited to cases of insolvency or bankruptcy; and it seems that this is not a condition which in no case admits of exception. See *Wilmshurst v. Bowker*, 2 M. & Gr. 812, and the Case of the *Constantia*, 3 Rob. Adm. Reports, 321.

cases of this sort. Ships in harbour, carriers, bills have been stopped. In short, where the goods are *in transitu*, the seller has *that proprietary lien. *The goods are in the hands of the defendants to be conveyed*; the owner may get them back again." And it was also held, in *Dixon v. Yates*, 5 B. & Ad. 315, by Littledale, J., that so "long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them: and if they remain in the possession of his agent, i. e. a warehouseman or carrier, he may stop them."

This very general rule, must, however, be taken with some degree of qualification, and applied only to cases of insolvency or bankruptcy, since the reversal in error of the case of *Wilmshurst v. Bowker*, 7 M. & Gr. 882.

In that well known and much litigated case, the plaintiffs bought a quantity of wheat of the defendants, under the following contract: "Sold, the 25th of October, 1836, to Messrs. J. W., and Son, about 300 quarters of wheat, as per sample, at 51s. per quarter, on board. Payment by banker's draft on *London* at two months' date, to be remitted on receipt of invoice and bill of lading." On the 27th of October the wheat was put on board of a general ship, under a bill of lading, by which it was made deliverable "to order or assigns, he or they paying freight," &c. The defendants caused an insurance to be effected on the wheat by their agents, which insurance was forwarded to the plaintiffs, in pursuance of an arrangement with the plaintiffs, whereby they were to charge them the premium in addition to the cost price of the wheat. The defendants sent the plaintiffs the bill of lading indorsed generally, and an invoice, stating the wheat to be shipped by order, and *for the account and risk of the plaintiffs*. Upon the receipt of the invoice and bill of lading, the plaintiffs instead of a banker's draft on *London*, transmitted to the defendant their own acceptance for the invoice price of the wheat, and the cost of the insurance, which the *defendants immediately returned, informing the plaintiffs by [*341] letter that such acceptance was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo, which they obtained back from the captain of the vessel *and resold*. The Court of Common Pleas held, that "There is no doubt that the *property* in the wheat passed to the plaintiffs under the contract, upon which point much of the argument before us has turned; but the question is, as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion, that the intention of the parties, under this contract was, that the consignor should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the banker's draft, not upon the delivery of the wheat, but on the receipt of the bill of lading, which in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading, and the remitting of the banker's draft, to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo. When goods are sold and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded *on payment of the price*; "but

the buyer," as is observed by Mr. Justice Bayley, in *Bloxam v. Sanders*, 4 B. & C. 948, "has no right to have the possession of the goods until he pays the price." In the present case, it is part of the stipulation that something shall be done by the buyer before the time when, in the usual course of business, the goods can be actually delivered; namely, upon the handing over of the bill of lading to the *buyers, which ordinarily [*342] precedes the arrival of the ship; so that the right to the possession of the goods could not vest until the buyer either remitted, or tendered, or offered to remit, the banker's draft in payment."

Now these principles were expressly sanctioned by the Exchequer Chamber, and are therefore valuable as rules of law. The judgment was reversed on these grounds:—"We accede," Lord Abinger, C. J. said, "to the general principle laid down by the court below, and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs. But we draw no such inference from what appears upon the record. The delivery of the bill of lading, and the remitting of the banker's draft, could not be simultaneous acts; the plaintiffs must have received the bill of lading and invoice before they could send the draft. The default on the part of the plaintiffs amount to no more than this, that they have omitted to perform one part of their contract." (7 M. & Gr. 891.)

Thus the case appears to fall within the rules applicable to the ordinary one of a vendor who having sold on credit has not been paid. There was no insolvency on the part of the consignee, and nothing therefore to give the consignor the extra power of stopping *in transitu*: the payment was a condition subsequent, and not a condition precedent, and the case is analogous to that of *Martindale v. Smith*, *supra*.

Whether the effect of stoppage *in transitu* is merely to restore the possession, or to rescind the sale, has been a much vexed question. The modern opinions very strongly incline to the conclusion that it does not rescind the sale, but merely places the parties in the same position as if they had not parted with the goods.

To this view the Court of Exchequer strongly inclined *in the [*343] recent case of *Wentworth v. Outhwaite*, 10 M. & W. 436, the Lord Chief Baron (Abinger) alone dissenting. Lord Kenyon thought it did not rescind the sale, and called it "an equitable lien adopted by the law for the purposes of substantial justice;" and so thought Mr. Justice Bayley, as may be gathered from the judgment above cited in *Bloxam v. Sanders*. See also *Edwards v. Brewer*, 2 M. & W. 375; *Stephens v. Wilkinson*, 2 B. & Ad. 323; and *Wilmshurst v. Bowker*, 5 Bing. N. C. 547. In point of principle there appears to be no distinction between the stoppage of delivery before and after the delivery of the goods: it is in either case the exercise of a right to withhold delivery. Why the stoppage of an inchoate delivery should be fraught with results wholly distinct from those resulting from withholding a delivery which has not begun, we know not; the parties are the same, their respective rights until stoppage are the same, and the exercise of the right by the vendor is virtually the same in both cases. The fact that the goods are stationary in the one case and in transit in the other, does not present a reason why their stoppage should

vest the property in them in one case in the *vendee*, and in the other in the *vendor*. It appears therefore, to be the sounder conclusion, that stoppage *in transitu* does not rescind the sale.

The person who stops goods *in transitu* must, if not the vendor, stand in the position of vendor, and not in that of a mere surety for the price. (*Siffken v. Wray*, 6 East, 371.)

The recent case of *Jenkyns v. Usborne*, 7 M. & Gr. 678, throws considerable light on the question of who may exercise the right of stopping *in transitu*; and it is also a good example of the transactions out of which these questions usually arise. Certain merchants of London had ordered beans of B. and C., Leghorn merchants, through the plaintiff their agent. B. and C. *shipped more than the quantity ordered, and drew two bills upon the London merchants, one for the quantity ordered, and [*344] the other for the residue, and they transmitted those bills to the London merchants through the plaintiff, with a letter of advice and an indorsed bill of lading for the whole cargo. The beans were shipped in 3932 sacks. The London merchants accepted the bills for the beans ordered, but declined to take the residue, or to accept the bill drawn against them. The plaintiff, however, consented to take the residue of the beans, and the London merchants thereupon wrote a letter to him, acknowledging such residue to be his, and inclosed an order to the captain to deliver to the bearer the residue of sacks. The plaintiff thereupon handed over the bill of landing to the London merchants, and accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship the plaintiff sold the residue to E., who accepted a bill for the amount drawn by B., who happened to be in London, and the plaintiff handed to one Thomas the letter of the London merchants and the delivery order. Thomas afterwards applied to the defendant for an advance of cash, and handed him over as a security (*inter alia*) such letter and delivery order, and the defendant gave his acceptance to Thomas for the amount of cash required, which acceptance was honoured at maturity. Before Thomas's acceptance became due, and before the arrival of the ship, Thomas stopped payment. When the ship arrived, the portion of the cargo for which the London merchants had accepted the bill was delivered to him. On these complicated facts the question arose whether the plaintiff had such a property in the goods as to enable him to stop *in transitu*. The judgment in the following passage, fully explains the law on this subject. "It was objected that it is only the owner of the goods who can exercise that right; and that, in this case, the *property in the goods had not vested in the plaintiff at the time of the stoppage, but only an interest in, and right to receive, a certain [*345] portion of the cargo, to be afterwards ascertained and appropriated to the parties intended: but we see no sound distinction, with reference to the right of stoppage *in transitu*, between the sale of goods, the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him: if he may rescind the contract in the one case for the insolvency of the purchaser, he must, by parity of reason, have a right to rescind it in the other.

"But it is further objected, that the agreement between the plaintiff and Thomas, coupled with the delivery order signed by the endorsee of the bill of lading, and the subsequent transfer of the rights of Thomas to the de-

fendant for a valuable consideration, put an end to the right of stoppage *in transitu*: and that such an arrangement was treated as equivalent to an actual assignment of the bill of lading, which, if made to a *bona fide* purchaser for value, would have that effect.

"The actual holder of an endorsed bill of lading may, undoubtedly, by indorsement, transfer a greater right than he himself has. It is at variance with the general principles of law, that a man should be allowed to transfer to another a right which he had not: but the exception is founded on the nature of the instrument in question, which, being like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a [*346] situation to transfer the instrument itself, which is *the symbol of the property itself. In the present case, Thomas was not in possession of the bill of lading: he had only an order on the captain to deliver the goods on arrival; and when, under the circumstances stated in the case, that order was handed over to the defendant, it appears to us, that, although an interest in the *contract* passed to the defendant, the interest in the *goods* did not pass, as it would have done if the transfer had been by assignment of the bill of lading; but that such interest in the goods was still liable to be defeated by the insolvency of Thomas, and a proper exercise of the right of stoppage *in transitu*."

In the case of *Akerman v. Humphrey*, 1 C. & P. 53, certain goods had been consigned by Dent to Hutchinson; an invoice had been sent to Hutchinson, and a shipping-note, advertising him that the goods had been shipped for him on board the *Durham* for Hay's Wharf. Hutchinson handed over the shipping note to Akerman as a security for money advanced upon it by Akerman, and gave him an order upon the wharfingers to deliver the goods to him on arrival. Hutchinson became insolvent, and the goods were stopped *in transitu*. Mr. Justice Burrough said, "I do not think the giving of the shipping-note and the delivery-order to the plaintiff made a change in the property; and I think the shipping-note does not amount to a bill of lading. A bill of lading is exactly like a bill of exchange, and the property it refers to passes by endorsement of it, but not by delivery without endorsement. I do not think this shipping-note, from the nature of it, is indorsable; and here, in point of fact, it is not endorsed; therefore, in my judgment, there is no change of property."

Manifold questions have arisen whether the transit was at an end at the time of this stoppage; in other words, whether the goods had passed into the possession of the vendee, and this often involves collateral questions [*347] *of constructive possession. As they all affect the same point, and are determined by the same rules, we shall examine them together.

When goods are in the hands of a carrier, and the vendee takes them into his own, whether with or without the carrier's consent, there is no doubt the right of stoppage is terminated. *Whitefield v. Anderson*, 9 M. & W. 534, per Parke, B. That is the simplest case. The vendee gets possession, and that is enough.

The next case is where the vendee does not get the whole of the goods into his possession, but part of them only. Now in these cases the effect of terminating the right of the vendor to stop the remainder is less obvious, but at the same time it has been reduced to this very intelligible rule :—Where the taking of a part only of the goods was merely in the process of taking, and with a view to take the whole, the right to stop is gone. But where there is an intention to separate the part taken from the remainder, the right to stop the remainder is not gone. The taking of samples is an equivocal act, and the question is *quo animo* were they taken ; and whether with the intention of taking actual possession of the whole, or only in order to see if the goods were disposable. *Jones v. Jones*, 8 M. & W. 442 ; per Parke, B. The authorities on this point were usefully reviewed in the late case of *Tanner v. Scovell*, 14 M. & W. 36 ; where the Court said, “ Before the time of the decision in *Slubey v. Heyward*, 2 H. Bl. 504, the subject of stoppage *in transitu* had not undergone the great consideration it has of late years ; and hardly any thing was held sufficient to determine the right unless there was an actual taking possession by the purchaser himself, by going and weighing the commodity or otherwise, and so taking manual possession of it. In all the subsequent cases in which part deliveries have been *held not to be sufficient to prevent the right of stoppage (there are several of them) the vendee meant to separate the part delivered [*348] from the remainder, and to take possession of that part only, and in most of them the vendor concurred in that act. I may observe, that *Taunton, J.*, in the case of *Betts v. Gibbons*, 2 Ad. & Ell. 57, made an observation which is very justly questioned by *Mr. Smith*, in his book on Mercantile Law, viz. that ‘ a partial delivery is a delivery of the whole, unless circumstances shew that it is not so meant.’ *Mr. Smith* appends a quære to that dictum, and with very great reason. It will be found that the only two cases, so far as I have looked at them, which bear the semblance of an authority, that a mere part delivery is sufficient to put an end to the right of stoppage *in transitu*, are these, *Slubey v. Heyward*, and *Hammond v. Anderson*, 1 N. R. 69. In the case of *Bunney v. Poyntz*, part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In *Jones v. Jones*, 8 M. & W. 431, on the other hand, this Court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo, with the intention of obtaining possession of the whole, for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit ; but it was fully admitted in that case, that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu*. The same doctrine is laid down in *Miles v. Gorton*, 2 C. & M. 504, and in *Dixon v. Yates*, 5 B. & Ad. 313. There the vendee took samples, coopered and marked the casks in which the goods were, and sold them to different purchasers, one of whom obtained possession of a part ; and yet it was held that the lien of the unpaid vendor still subsisted. If the vendee takes possession *of part, not meaning thereby to take pos- [*349] session of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more : the right of lien and the right of stoppage *in tran-*

situ on the remainder still continue. Besides the cases I have referred to, I have no doubt others may be found in which this doctrine is clearly established. *The whole, in truth, depends upon the intention of the vendee.*

"In *Wentworth v. Outhwaite*, 10 M. & W. 451, several parcels of goods were purchased under one entire contract from Hill and Co., at Hull, by the consignee, living at Mickley, about thirty miles from Leeds. A part—two packages—were forwarded by the railroad to Leeds, and arrived on the 20th of August. One of these packages was taken to Mickley Mills by the consignee on the 23d of August. The remaining package was seized by the sheriff, the plaintiff, on the 11th of September. But in the meantime some remaining parcels, computed in the same contract, which were forwarded by water carriage to Boroughbridge, were stopped *in transitu*, on the 8th September, and it was contended for the defendants, that this had the effect of revesting in the consignor, at that time, *all* the parcels contained in that contract, and, amongst others, that seized by the sheriff on the 11th of September. In this case the Court held that the vendee had a right to retain that portion of the goods only which had reached their destination, and have therefore been actually delivered. Where goods have not been paid for, there must be, as we have seen, either an actual or constructive delivery to the vendee, in order to put an end to the vendor's right of stoppage. What is a constructive delivery must mainly depend on the facts in each case. One of the latest authorities on this point is that of *Lackington v. Atherton*, 7 M. & Gr. 360, where timber was deposited by one Tindal [*350] with the Dock Company, *and was entered in their books in his name. The defendant and one Congreve, who had purchased from Tindal, sold to the bankrupts, and gave them a delivery order. If that order had been in the name of Tindal, all would have been right; there would have been a constructive delivery to the bankrupts, and the property would now have vested in their assignees. But the delivery order was in the name of persons who were strangers to the Company, namely, the defendant and Congreve, to whom there had been a sale by Tindal. "The question is, whether that order was a document which the Company was bound to obey. The Company were neither the servants nor the agents of the defendant and Congreve: they were the agents of Tindal, and the order in question was, in effect, no order at all upon them. It seems to me, on this short ground, that there was no constructive delivery to the bankrupts," per Tindal, C. J.

The same question arises in determining for which party a consignee holds goods—for the vendor or the vendee?—for on this depends whether they are in the possession of the one or the other, and therefore whether the right of stoppage be gone. The case of *Tanner v. Scovell* mooted this point: the holder of the goods was a wharfinger, and although he had been directed to deliver to the insolvent vendee, and had obeyed his order, and had delivered a part of the goods, still it was held, that as he, the wharfinger, had never transferred the goods in his books from the one name to the other, and there being no other evidence *that he held for and was employed by the vendee*, there was no constructive possession by him; see also *Dodson v. Wentworth*, 4 M. & Gr. 1080, and *Dixon v. Baldwin*, 5 East, 175. There must be some express contract to that effect, in order to convert a carrier into an agent for the consignee, or some evidence from which it can

be implied, and such contract must be distinct from the *original one for carriage as a carrier, but to hold the goods in a new character [*351] for the purpose of custody; *Whitehead v. Anderson*, 9 M. & W. 535. 518; and see instances, *Foster v. Frampton*, 6 B. & C. 107; *Ellis v. Hunt*, 7 T. R. 46.

Notice to stop *in transitu* must be given by the person who has a right to stop to the person who has the immediate custody of the goods; *Whitehead v. Anderson*.

Mr. Smith states the duties incumbent on the vendee to be, first to accept them, and, secondly, to pay for them. If he refuse to accept them, the vendor, having performed all conditions precedent on his part, may sue him, either specially upon his contract, (a) or (if the property have passed to the vendee) for goods bargained and sold; in which latter form of action he will recover his entire price, while, in the special form, he will recover but the amount of damage actually sustained by himself. (b)

"If the goods are to be delivered at a stipulated place, the vendor before suing for the price must tender them there, unless, indeed, the vendee have refused or put it out of his own power to complete his contract. If there be no stipulated place, it is the vendee's *business to fetch them. (c) [*352] Where the goods are to be forwarded by a carrier, the vendor must enter them, so that the carrier may be responsible for their value if lost. (d)

"If the goods were to be of a particular description, they must be such as correspond with that description; (e) *ex. gr.* with the sample, if they were sold by sample, (f) in which case the vendee has a right to inspect and compare before receiving them, and may, if prevented from doing so, rescind the contract. (g)

"If the goods have been delivered, and the vendee, after that, neglect to pay the price, the vendor may recover it, in an action for goods sold and delivered; nay, there are instances in which he has been allowed to waive the tort, and recover in this form of action, against one who had wrongfully and fraudulently gained possession of them. (h) But he cannot recover

(a) See *Boorman v. Nash*, 9 B. & C. 145; *Greaves v. Ashlin*, 3 Camp. 426; *Boyce v. Warburton*, 2 Camp. 480; *Spaeth v. Hare*, 9 M. & W. 327.

(b) *Hankey v. Smith*, Peake, 42, et notas. The measure of this damage is the difference between the market price and the contract price, on the day of tendering the goods for acceptance. (*Philpotts v. Evans*, 5 M. & W. 475.) As to the measure of damages for not accepting stock, see *Hecksher v. Gregory*, 4 East, 607; *Bordenave v. Gregory*, 5 East, 107: for not replacing it, *Shepherd v. Johnson*, 2 East, 21; *McArthur v. Lord Seaforth*, 2 Taunt. 257; and see 7 Geo. 2, c. 8, s. 11; *Tate v. Wellings*, 3 T. R. 531.

(c) *Glazebrook v. Woodrow*, 8 T. R. 366; *Jones v. Berkeley*, Dougl. 687. See *Rawson v. Johnson*, 2 East, 203; *Callonel v. Briggs*, 3 Sal. 112.

(d) *Clark v. Hutchins*, 14 East, 475.

(e) *Tye v. Finmore*, 3 Camp. 462, where it was held that in a case of written contract, it is not enough that there be a correspondence with the sample if there be a variance from the written description (*Haydon v. Hayward*, 1 Camp. 108; *Ellis v. Hamlin*, 3 Taunt. 52.) See *Flight v. Booth*, 1 Bing. N. C. 370; *Robinson v. Musgrove*, 2 M. & R. 92; *Dykes v. Blake*, 4 Bing. N. C. 463; and *Dobell v. Hutchinson*, 3 Ad. & Ell. 355, for an exposition of this doctrine as applied to cases of real property: the question in such cases is, Was the part of the contract which the vendor has broken a *condition precedent*?

(f) *Hibbert v. Shee*, 1 Camp. 113.

(g) *Lorymer v. Smith*, 1 B. & C. 1.

(h) *Hill v. Perrott*, 3 Taunt. 274; *Biddle v. Levy*, 2 Stark. 20, per Gibbs, C. J., *Sed vide* B. N. P. 130; *Lee v. Shore*, 1 B. & C. 94; *Lucas v. Godwin*, 3 Bing. N. C. 741.

[*353] in *assumpsit before the time of credit, if there be one, has expired; although the fraud of the defendant be such as would entitle him to rescind the contract, and bring trover for the goods immediately.”(a)

“It sometimes happens that there is such a difference between the goods delivered and their description in the bargain as would have justified the vendee in refusing to receive them; notwithstanding which he has taken them into his possession, and made use of them. In such a case it has been thought, that his conduct would be taken to amount to a confession that the vendor had performed his contract, and that he would be obliged to pay the whole price stipulated.”(b)

“And, indeed, it has been held, that where the vendee had expressly stipulated that they should be returned if not approved of, his keeping them an unreasonable time precluded him from doing so.”(c) But there are some cases in which it would be impossible, or very difficult, to return the goods; for instance, where they consist of bricks and timber put together in the shape of a building; or the breach of contract may not have been discovered till the articles have been received and used by the vendee. In such a case it was formerly thought that the vendor ought to recover the whole price, and the vendee to bring a cross action for the breach of contract.”(d)

[*354] It now, however, is *agreed, that the vendee may, in the action by the vendor, give evidence of the breach of contract, and that the vendor shall not recover more than the value of the benefit which the vendee has actually derived; and therefore, where there has been no benefit derived, shall recover nothing at all.”(e)

IV. WARRANTIES.

Warranties are either express or implied. In express warranties the vendor guarantees certain qualities in the subject of sale on certain conditions relating to it. They need not be in writing, for every statement at the time of a sale of a personal chattel is a warranty, if it appear to have been so intended. *Richardson v. Brown*, 1 Bing. 344; *Shepherd v. Kain*, 5 B. & Ald. 240; *Power v. Barham*, 4 Ad. & Ell. 473.

In general, any breach of warranty entitles the party to bring an action upon the breach of warranty, but not to return the article or rescind the con-

(a) *Ferguson v. Cadrington*, 9 B. & C. 59; *Shutt v. Smith*, 4 Tyr. 1019. See *De Symonds v. Minchwick*, 1 Esp. 430; *Reed v. Hutchinson*, 3 Camp. 352.

(b) *Grimaldi v. White*, 4 Esp. 95; *Fisher v. Samuda*, 1 Camp. 190; *Groning v. Mendam*, 1 Stark. 257; *Hunt v. Silk*, 5 East, 449. Sed quare, for it seems mere evidence by admission; et vide *Allen v. Cameron*, 1 Cr. & Mee. 837. See *Campbell v. Fleming*, 1 A. & E. 40.

(c) *Beverley v. Lincoln Gas Light Company*, 6 A. & E. 829; *Bianchi v. Nash*, 1 M. & W. 545.

(d) *Broom v. Davis*, 7 East, 480, in nota.

(e) See *Farnsworth v. Gerrard*, 1 Camp. 38; *Basten v. Butter*, 7 East, 484; *Okell v. Smith*, 1 Stark. 107; *Allen v. Cameron*, 1 Cr. & Mee. 837; *Chappel v. Hicks*, 4 Tyr. 44; *Cousins v. Padden*, 4 Dowl. 492; *Grounel v. Lamb*, 1 M. & W. 352. The action of the vendor ought to be *indebitatus assumpsit* for the labour he has performed, not on the special contract, *ibid.* In *Thornton v. Place*, 1 M. & R. 218, Mr. J. Parke said, that where work agreed to be done according to a specification, varied from that specification, the plaintiff could not recover either the specified price or the actual value, but must recover the specified price, subject to a deduction of the sum which it would take to alter the work, so as to make it correspond with the specification.”

tract in case the thing sold has been *accepted*. The buyer is entitled to a trial, and may retain the articles warranted within a reasonable time for such trial, but not afterwards, as *we have already seen, in treating of the doctrine of acceptance (ante, p. 71,) and see *Street v. Blay*, 2 [*355] B. & Ad. 460; and *Jordan v. Norton*, 4 M. & W. 155.

Where wilful fraud is discovered, a contract, as we have seen, is avoided, even after acceptance, but not otherwise. Manifest defects contemplated by the parties on the principle of *haud enim decipitur qui scit se decipi* are supposed to be excluded even from the express terms of a warranty. But in other cases the vendee may maintain an action for the deceit, in which he must allege a *scienter*, and show that the description was false within the knowledge of the seller. See judgment of Tindal, C. J., in *Budd v. Fairmaner*, 8 Bing. 53, and see ante, p. 137, note (a).

Warranties were held to be implied wherever the established and known custom, or the manner of dealing in a particular trade naturally include them. (*Jones v. Bowden*, 4 Taunt. 847); such as that the goods sold shall be of merchantable quality, (*Laing v. Fidgeon*, 6 Taunt. 108.) But this doctrine is somewhat qualified by more recent judgments, and the law now is, that, if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed: as, for instance, where A., a wine merchant, ordered a crane rope of B., a dealer in, and who represented himself as a manufacturer of ropes, and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and, being told that it was wanted to raise pipes of wine from the cellar, said, that a rope must be made on purpose, [*356] (*Brown v. Edgington*, 2 M. & Gr. 279.) *But in *Olivant v. Bayley*, where the defendant had ordered a two colour printing machine on the plaintiff's patent principle, and the plaintiff furnished it, it was held that there was no implied warranty that it should answer the purpose, it being a "known, ascertained article," which it might be supposed that the purchaser had previously examined; "but that if it was not a known, ascertained article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price, unless the machine supplied was reasonably fit for the purpose for which it was ordered." (*Olivant v. Bayley*, 5 Q. B. 288.) And this decision is perfectly reconcilable with that of *Shepherd v. Pybus*, 3 M. & Gr. 868, and *Bluett v. Osborne*, 1 Stark. N. P. C. 384; *Parkinson v. Lee*, 2 East, 314; and *Chanter v. Hopkins*, 4 M. & W. 399; *Jones v. Bright*, 5 Bing. 533, from which the general inference is, that, where the purchaser has had a full opportunity of examining the article purchased for himself, there is no implied warranty that the thing sold shall answer the purpose for which it is bought; but otherwise, where the purchaser has not had such opportunity.

This doctrine is more than borne out by the judgment in the recent cases of *Hart v. Windsor*, 12 M. & W. 68, and *Sutton v. Temple*, 12 M. & W. 64, which related to a demise of *land*, in itself distinguishable from con-

tracts respecting chattels, but in which the law relating to them was nevertheless declared, and the cases of *Smith v. Marrables*, 11 M. & W. 5, qualified, whilst other previous cases were expressly overruled. *Hart v. Windsor* and *Sutton v. Temple* properly belong to the law of landlord and tenant: (a) the judgments in those cases, however, illustrate the rule now [*357] in force. *It must be premised that *Smith v. Marrables* (following the decisions given in *Edwards v. Etherington*, R. & M. 268, and *Collins v. Barrow*, 1 M. & R. 112,) had determined that it is an implied condition in the letting of a house, that it shall be reasonably fit for habitation; and that if it be not (e. g. where it is greatly infested with bugs,) the tenant may quit it without notice. And this is law; for the case is clearly distinguishable from demises of land, for the letting of the goods and chattels, as well as the house, implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house according to its particular description, and suitable in every respect for his use. "Suppose it turn out," said the Lord Chief Baron in the case of *Sutton v. Temple*, 12 M. & W. 61, "that there is not a bed in the house, surely the party is not bound to occupy it, or to continue in it. So also in the case of a house infested with vermin, if bugs be found in the beds, even after entering into possession of a house, the lodger or occupier is not bound to stay in it. Suppose, again the tenant discover that there are not sufficient chairs in the house, or that they are not of a sort fit for use, he may give up the possession of the house."

It is otherwise with respect to demises of *land*. In that case the general rule of law is, "that where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent, whether it answer the purpose he took it for or not." Per Abinger, C. B., in *Sutton v. Temple*. The law merely annexes to the demise a condition of title in the lessor, and of security against eviction to the lessee. *Hart v. Windsor* and *Smith v. Marrables*, however, taken together, best exhibit the distinction. Both were cases of the demise of a house, both were unfit for occupation, and [*358] both *from the same unforeseen cause. (b) In the one (*Smith v. Marrables*) it was held that there *was* an implied warranty of fitness, because the subject of demise was that of goods and chattels, it being a furnished house, in which the defect was not apparent. In *Hart v. Windsor* there was held to be no implied warranty, because there was no demise of goods or chattels, it being an unfurnished house, and therefore a demise of land only, there being an implied contract only as to the estate itself, and not as to the condition of the property. The learned judgment in *Hart v. Windsor* should be referred to, and attentively studied on this subject. It is, however, foreign to the object of this work.

V. DEBTS.

A debt implies a contract to pay, of which the parties are the debtor

(a) A branch of law distinct from that of contracts, though sometimes improperly classed with it.

(b) Both houses swarmed with bugs.

and creditor. It is the debtor's duty to tender payment by an actual production of the money to the creditor, unless the latter declares that he will not accept it: it must also be unconditional. The duty of the creditor is to receive the payment.

The subjects of contracts of debts are nearly as numerous as contracts themselves. They range, however, under a few general heads: thus goods sold and delivered, goods bargained and sold, are the subjects of debt; so are money paid to the use of another, money lent, and work and labour done. Debts involve the same rules as other contracts. As regards the appropriation of payments, some little difference arises.

When the payer is indebted in more ways than one to the payee, the rule is, "Where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis*. Where the creditor objects, **recipitur in modum recipientis*. Per Tindal, C. J., *Webb v. Wetherby*, 1 Bing. N. C. 502. [*359]

Where there is an account current between the parties, the presumption is, that it was their intent to apply the first item on the credit side to the first on the debtor side; and thus when there is no express appropriation, the law appropriates the payment to the earlier debt.

The creditor must, on his part, receive payment when it is offered to him, and give a receipt.

However strong evidence a receipt may be, it is no conclusive proof of payment, (*Stratton v. Rastall*, 2 T. R. 366; *Sampson v. Corke*, 5 B. & A. 611,) unless by deed, as then no contrary evidence is admitted by law, (*Gilb. L. Ev.* 142.) A receipt in full of all demands was once conclusive, without there were mistakes, (*Alner v. George*, 1 Camp. 392; *Bristow v. Eastman*, 1 Esp. 172); but this doctrine cannot be maintained, and it must be used as proof to be submitted to the jury, and capable of being rebutted, (*Benson v. Bennett*, 1 Camp. 394.) 3 & 4 W. 4, c. 23, enacts that no stamp is needed for any receipt under 5*l.*; but other receipts do require them, and after they have been written cannot be stamped, (23 Geo. 3, c. 49, s. 14,) unless under a period of fourteen days, and then on paying 5*l.* and the duty, or one calendar month, by paying the duty and 10*l.* (55 Geo. 3, c. 55, s. 11.)

VI. BAILMENTS AND CARRIERS.

Sir William Jones thus defines Bailments:—

"1. Bailment is a delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time, or use, for which they were bailed, shall have elapsed or be performed."

"2. Deposit is a bailment of goods to be kept for the bailor without a recompense." [*360]

"3. Mandate, is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them."

"4. Lending for use, is a bailment of a thing for a certain time, to be used by the borrower without paying for it."

"5. Pledging, is a bailment of goods by a debtor to his creditor, to be kept till the debt be discharged."

"6. Letting to hire is, 1, a bailment of a thing to be used by the hirer for a compensation in money; or 2, a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee, on the goods bailed, and that for a pecuniary recompense; or 3, of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward."

"7. Innominate bailments, are those where the compensation for the use of a thing, or for labour and attention, is not pecuniary; but either, 1, the reciprocal use, or the gift of some other thing; or, 2, work and pains reciprocally undertaken; or, 3, the use or gift of another thing in consideration of care and labour, and conversel."

"8. Ordinary neglect, is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns."

"9. Gross neglect, is the want of that care which every man of common sense, how inattentive soever, takes of his own property."

"10. Slight neglect, is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels."

"11. A naked contract, is a contract made without consideration or recompense."

[*361] "II. The rules which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these:—

"1. A bailee, who derives no benefit from his undertaking, is reponsible only for gross neglect."

"2. A bailee, who alone receives benefit from the bailment, is responsible for slight neglect."

"3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect."

"4. A special agreement of any bailee to answer for more or less, is in general valid."

"5. All bailees are answerable for actual fraud, even though the contrary be stipulated."

"6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement."

"7. Robbery by force is considered as irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect."

"8. Gross neglect is a violation of good faith."

"9. No action lies to compel performance of a naked contract."

"10. A reparation may be obtained by suit for every damage occasioned by an injury."

"11. The negligence of a servant, acting by his master's express or implied order, is the negligence of the master."

These definitions and rules sufficiently explain the nature of a class of undertakings and their responsibility, which, though they originate in a contract, result, when broken, in cases of tort, for which a remedy is sought by an action upon the case: this is not the province of a work confined to contracts.

It may be useful, nevertheless, to mention, that a common carrier is at common law an insurer of the property intrusted to him, and is answerable

for every loss or *injury happening to it while in his custody, from whatsoever cause arising, the acts of God and the Queen's enemies [*362] alone excepted. In all other cases his faultlessness is no discharge from his liability for any such damage up to the time of delivery of the goods according to his instructions; but if after their arrival at their destination, he agrees to hold them as wharfinger or warehouseman, his liability then depends upon such new contract. *Cairns v. Robins*, 8 M. & W. 58; see also *Gatliff v. Bourne*, 4 Bing. N. C. 332.

The liabilities thus arising have been qualified in certain cases by the 11 Geo. 4, and 1 Wm. 4, c. 68, which enacts that no common carrier *by land*, for hire, shall be liable for the loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, bills, bank-notes, order-notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, (*Owen v. Burnett*, 2 Cr. & M. 353,) china, silks, manufactured or unmanufactured, wrought up or not wrought up with other materials, furs, (on the question what falls within this denomination, see *Mayhew v. Nelson*, 6 C. & P. 59,) or lace contained in any parcel, when the value exceeds the sum of 10*l.*, unless at the time of delivery at the office, warehouse, or receiving house, (*Syms v. Chaplin*, 5 A. & El. 642,) the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. By sect. 2, common carriers, on the delivery of such parcels exceeding the value of 10*l.*, and so declared as aforesaid, may demand an increased rate of charges, which is to be notified by a notice in legible characters affixed in the office; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their *knowledge. [*363] By sect. 3, carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to the benefit of this act. Carriers cannot *by a notice* limit their liability at common law to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this act: sect. 4. Every office of such common carrier shall be deemed a receiving-house; any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor: sect. 5. Special contracts are not to be affected by this act: sect. 6. Parties entitled to damages for parcels lost or damaged, may recover the extra charges for insurance: sect. 7. This act does not protect any such common carrier from liability to answer for any losses or injury, arising from the felonious acts of any servant in his employ; nor does it protect any such servant from liability to answer for the consequences of his own neglect or misconduct: sect. 8. Common carriers are not concluded as to the value of any parcel by the value declared: sect. 9. Money may be paid into court by common carriers in the same mode, and with the same effect, as money paid into court in any other action: sect. 10. Notwithstanding this act, it was considered that the carrier was still liable for *gross negligence*, although he might have affixed in his office such a notice as the act requires, and although the articles lost by his misconduct might be

of such a description as to require a declaration of value and payment of increased charges, which their owner had, however, neglected to make in respect of them. See the judgment of the Court in *Owen v. Burnett*, 2 Cr. & M. 353; and see *Wyld v. Pickford*, 8 M. & W. 443, which decides, that negligence must be replied to a plea of the notice.

[*364] The carrier is no longer liable for the loss of the *articles named in the statute, occasioned even by the gross negligence of his servant, where such articles have not been insured; see *Hinton v. Dibdin*, 2 Q. B. 646; where all the cases upon the remaining liability of carriers under the statute, will be found elaborately reviewed in the judgment.

VII. GUARANTEES.

A Guarantee is a promise to answer for the debt of another, or for his performance of some duty or undertaking for which he is liable. We have already amply discussed the bearing of the Statute of Frauds on guarantees, which it requires to be in writing, and signed by the party to be thereby charged.

The guarantor's liability depends on the terms of his guarantee. The chief difficulty is to distinguish between continuing guarantees and those which are not continuing. Wherever the guarantor does not expressly confine his liability to a single or to certain specific transactions, it is generally a continuing guarantee, for if a party means to confine his liability, he should take care to say so. See *Merle v. Wells*, 2 Camp. 413, per Lord Ellenborough, C. J.

The following have been held to be continuing guarantees:

"To A. B. I have been applied to by C. D., to be bound to you for *any* debts he may contract, not to exceed 100*l.*, in his business as a jeweller. I consider myself bound for *any* debt he may contract, etc." *Merle v. Wells*, 2 Camp. 413.

"If you will credit A. B., I engage that his payments shall be regularly made from this day, &c." *Simpson v. Manley*, 2 C. & J. 12, 13, note.

And a bond conditional for the payment "of all such sums, not exceeding [*365] 200*l.*, as the plaintiffs should advance *for or on account of bills from time to time drawn by B. on plaintiffs, within three calendar months after receiving notice to pay such sums, has been held to be a continuing security." *Batson v. Spearman*, 9 Ad. & E. 298.

"In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month; I hereby guarantee the payment of any sum that shall be due and owing to you upon this account for goods supplied." *Hitchcock and another v. Humfrey*, 5 M. & G. 559.

"In consideration of your supplying C. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof to the amount of 200*l.*" *Mayor v. Isaac*, 6 M. & W. 605.

"In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you to the amount of 60*l.* Should he fail to pay at the expiration of the above credit,

I bind myself to pay you within seven days from the date of receiving notice from you." *Martin v. Wright*, 14 Law Jour. Q. B. 142.

"As you are about to enter upon transactions in business with Messrs. C. (with whom you have already had dealings,) in the course of which they may be from time to time largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money from that firm, whether it consist of the same members as at present, or others, now, is, or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l*." *Johnstone v. Nicholls*, 1 C. B. 251.

*The following, on the contrary, have been held to be not continuing guarantees: [*366]

"Messrs. Allnut and Arbouin,
"50 Mark Lane,

"Sirs,—I hereby guarantee Mr. John Jennings's account with you for wines and spirits, to the amount of 100*l*."

(Signed) "E. ASHENDEN.

"Sittingbourne, April 14th, 1838."

At the time when the defendant gave and signed this guarantee, addressed to the plaintiffs, the only account between Jennings and the plaintiffs was that for the spirits supplied, to the amount of 83*l*. 1*s*., the supply of spirits being the only transaction which the plaintiffs and Jennings had had together prior to the time when this guarantee was given. *Allnut v. Ashenden*, 5 M. & Gr. 392.

"I hereby agree to be answerable to K. for the amount of five sacks of flour to be delivered to W. T., payable in one month." *Kay v. Greaves*, 6 Bing. 276.

"I hereby agree to be answerable for the payment of 50*l*. for T. L., in case he does not pay for the gin, &c., he receives from you, and I will pay the amount." *Nicholson v. Paget*, 1 Cr. & Mee. 48.

On the construction of guarantees, see further, *Dimmock v. Sturla*, 15 Law Jour. Exc. 65.

Where the construction of the guarantee is determined, the surety is of course liable to its full extent, in case of the failure of the party to discharge his own liability, which liability, as we have already seen, continues; that of the guarantor being merely collateral, and if the creditor were to enter into any arrangement whereby he discharged the principal debtor from his liability, he would, *de facto*, discharge the surety from his also: equally so if he prolonged the surety's responsibility by giving time to the [*367] debtor; but this is again subject to the qualification of ordinary forbearance; *Goring v. Edmonds*, 6 Bing. 94; *Muskett v. Rogers*, 5 Bing. N. C. 728; any express stipulation to the contrary excepted; *Holt v. Hadley*, 2 Ad. & El. 758. Express consent likewise on the part of the surety will, where it exists, enable the creditor to discharge the debtor; *Cowper v. Smith*, 4 M. & W. 519. These rules result from a principle thus explained by Pothier; "The extinction of the principal obligation necessarily induces that of the surety, it being of the nature of an accessory obligation, that it cannot exist without its principal; therefore wherever the *principal* is discharged, in whatever manner it may be, not only by actual payment or a compensation,

but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged on behalf of the principal debtor, he, therefore, is no longer obliged when there is no longer any principal debtor for whom he is obliged. In like manner the surety is discharged by the novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt, into which the first has been converted, since this new debt was not the debt to which he acceded."

Should any condition, express or implied, that has been imposed upon the creditor by the guarantee be omitted by him, the surety, will of course, not be liable. *Glynn v. Hertel*, 8 Taunt. 208. The engagement too would be vitiated and voided by any fraud. For by the concealing some material part, for instance, of the principal's original contract from the surety, the engagement would become so vitiated and avoided. *Pidcock v. Bishop*, 3 B. & C. 605.

[*368] The principle to be drawn from the cases, as in that of **Stone v. Compton* (5 Bing. N. C. 156), as laid down by Tindal, C. J., is this: "that, if with the knowledge or assent of the creditor any *material part* of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud."

The death of a testator, would release the executor from being liable for advances after his decease, as operating as a revocation (*Potts v. Ward*, 1 Marsh. 366.) So would any alterations which were made by creditor and principal of the terms of the original agreement without the express assent of the surety, however slightly the new terms may vary from the old ones in any material point, for the surety is bound only by the precise terms of the agreement he has guaranteed. (*Warre v. Calvert*, 2 Nev. & Per. 126.) So, also, if the transactions are of a different nature to those which form the subject of the guarantee, as, for instance, the substitution of a loan for a sale of goods; see *Evans v. Whyte*, 5 Bing. 485; *Glynn v. Hertel*, 8 Taunt. 208; see also *Whitcher v. Hall*, 5 B. & C. 267.

The surety, however, is nowise discharged by the debtor being trusted to a larger amount than specified in the guarantee.

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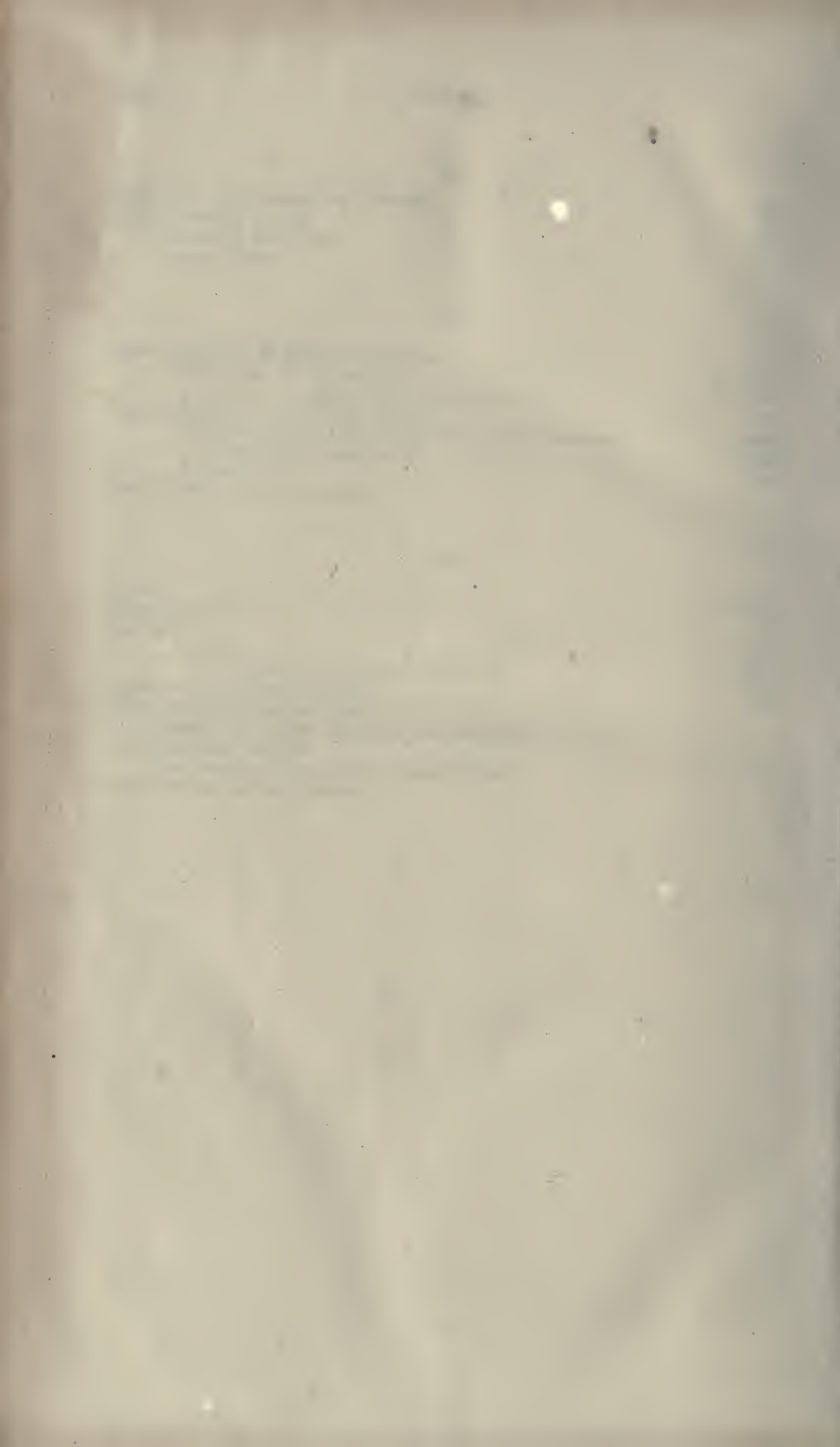
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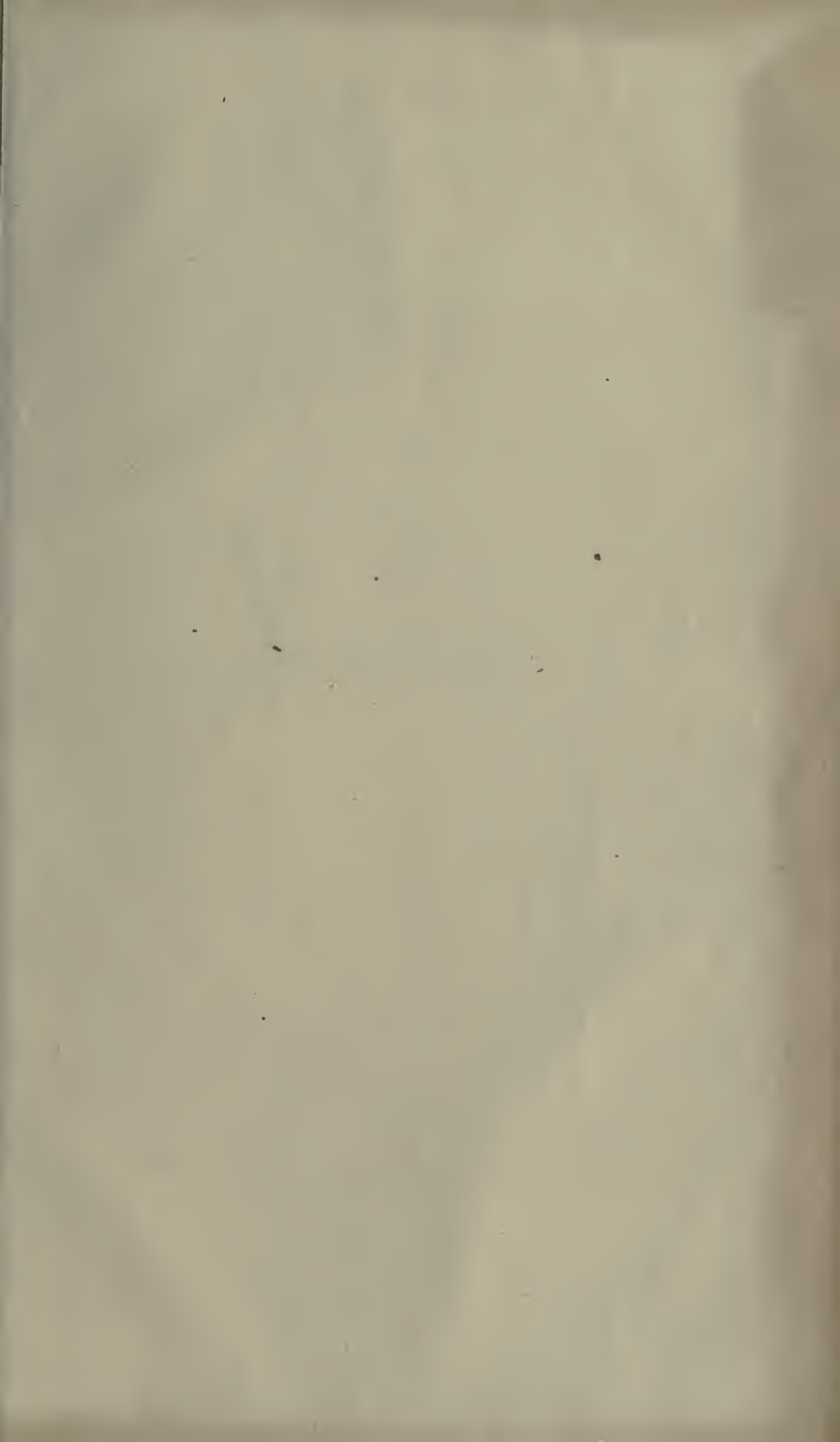
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